THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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LIST

OF THE

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1889.

Viscount *Cranbrook*, Lord President.
The Lord Chancellor, Lord *Halsbury*.
The Duke of *Richmond and Gordon*.
The Duke of *Buckingham*.
The Marquis of *Ripon*.
Earl *Granville*.
Earl of *Selborne*.
Earl *Spencer*.
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Sir *James Hannen*.
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Sir *Richard Baggallay*.
Sir *Richard Couch*.
Sir *Henry Cotton*.
Sir *Nathaniel Lindley*.
Sir *Charles Bowen*.
Sir *Edward Fry*.

And others ex-officio under the New Appellate Jurisdiction Act of 1887.

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ERRATUM.

Page 221, line 5 of head-note, *for* "Respondent's" *read* "Appellant's."

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

MEENAKSHI NAIDU . . . . . DEFENDANT; J. C.*
1888
AND
IMMUDI KANAKA RAMAYA KOUNDEN . PLAINTIFF. *Nov.* 1.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Mitakshara Law—Execution Sale—Son's Interest bound—Father's Debt not immoral.

Where it appeared that an execution sale related to the whole zemindary, and not merely to the interest of the judgment debtor therein:—

Held, in a suit by a son of the judgment debtor, impeaching his father's debt as tainted with immorality, that, on failing to establish that allegation, his suit must be dismissed. Under Mitakshara law the son's interest was liable for the father's debt.

APPEAL from a decree of the High Court (April 7, 1884) varying a decree of the Subordinate Judge of *Madura* (April 14, 1883).

The suit was brought by the son of the zemindar of *Velliya-kundam* against his father and the Appellant for a declaration that a promissory note for Rs.2000, granted by the zemindar and held by the Appellant, was given for illegal and immoral purposes, and that the sale of the zemindary under an order of the Court, in execution of a decree on the promissory note, and the purchase

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of it by the Appellant, was invalid and illegal as against the Plaintiff, and that the sale should not be registered by the Collector. The original Court dismissed the suit. The High Court varied the decree by declaring that the sale only affected the first Defendant's interests, and not those of the Plaintiff.

The facts are stated in the judgment of their Lordships. The material passage of the judgment of the High Court (*Turner*, C.J., and *Muttusami Aiyar*, J.) was as follows:—

"The income which remained for the support of the family was not large, and although the first Defendant may have been extravagant in his expenditure in proportion to his fortune, and have indulged in immorality, it is not shewn that the loan was taken with the intention that it should be expended in immoral purposes, or that it was so expended. The lender, looking to the necessitous circumstances of the family, may well have believed the money was required for family purposes, though there is no evidence that any representation of this kind was made to him, or that he lent his money on the faith of such a representation. All that is shewn is that the first Defendant contracted a debt. We have then to consider whether the Plaintiff is entitled to the whole or any portion of the relief sought by him. He is not entitled to a declaration that the debt was contracted for immoral purposes, nor is he entitled to a declaration that the judgment debt is not under any circumstances binding on him; but in view of the recent ruling (1) of the Privy Council that a sale in execution of a money decree of the right, title, and interest of an Hindu father will affect only the interests of the father, the Plaintiff is entitled to a declaration that the sale in execution of the decree of 1879 has affected the interests of the first Defendant only, and not those of the Plaintiff."

Mayne, for the Appellant, contended that this judgment was wrong. The only ground of relief alleged by the Plaintiff was that the decree of 1879 had been obtained in respect of a debt contracted for illegal and immoral purposes. On the concurrent

(1) Probably that of *Hurdey Narain* v. *Rooder Perkash*, Law Rep. 11 Ind. Ap. 26.

(S.) 11 M.I.A. 10 Cal 626

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findings of both Courts that this allegation of fact had not been maintained by the evidence the suit should have been dismissed. In satisfaction of that decree the Court was competent to sell the whole zemindary. All the proceedings in execution shew that the Court intended to sell the whole, subject only to the mortgage charges. Under the old Act of 1859 only the right, title, and interest of a judgment debtor were sold. The object of Act X. of 1877, see sects. 287, 306, 311, and 312, was to prevent auction sales being of only the right, title, and interest. Reference was made to *Deendyal Lal* v. *Jugdeep Narain Singh* (1); *Hurdey Narain* v. *Rooder Perkash* (2). The general principle is that one member of a joint family cannot be made liable by any other member for debt which was not incurred for the benefit of the whole family. The exception is that the son is bound to pay the father's debt, and the grandson is bound to pay the grandfather's, if not incurred for immoral purposes. Reference was made to *Hunooman Persaud Panday* v. *Munraj Koonweree* (3); *Girdharee Lall* v. *Kantoo Lall* (4); *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (5). The apparent contradiction of *Deendyal's Case* to these cases is first noticed in *Mussamut Nanomi Babuasin* v. *Modun Mohun* (6); *Simbhunath Panday* v. *Golab Singh* (7); *Pettachi Chettiar* v. *Sangili Veera Pandia* (8); *Rani Sartaj Kuari* v. *Rani Deooraj Kuari* (9).

The Respondent did not appear.

The judgment of their Lordships was delivered by

LORD FITZGERALD :—

In this case the Appellant was the decree creditor. The note for Rs.2000 was not originally passed to him, but he became the *bonâ fide* holder and upon that note he obtained a money decree against the zemindar. An attempt has been made to impeach that decree which their Lordships will presently refer to. The

(1) Law Rep. 4 Ind. Ap. 247.
(2) Law Rep. 11 Ind. Ap. 26.
(3) 6 Moore's Ind. App. Ca. 393.
(4) Law Rep. 1 Ind. Ap. 321.
(5) Law Rep. 6 Ind. Ap. 88, 104.
(6) Law Rep. 13 Ind. Ap. 1.
(7) Law Rep. 14 Ind. Ap. 77, 80.
(8) Law Rep. 14 Ind. Ap. 84.
(9) Law Rep. 15 Ind. Ap. 51.

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decree creditor then took the ordinary proceedings to have the zemindary attached and sold. The son of the zemindar, who was the Plaintiff in the suit now before their Lordships, intervened, and he first sought by petition an order that his interest in the zemindary should be excluded from the sale, and that the sale should be made subject to his right. It does not appear from any document before their Lordships what order, if any, was made on that petition; but their Lordships assume that the petitioner failed before the Court below in obtaining that protection which he sought. Notwithstanding that petition, proceedings towards a sale went on, and upon the documents before their Lordships they must come to the conclusion that the thing professed and intended to be sold, and actually sold, was not the father's share, but the whole interest in the zemindary itself. Throughout this case the son does not appear to have ever contended that no more than his father's interest was sold. His case was that the whole zemindary was sold out and out; he impeached the debt which led to the sale, and asserted that the decree founded on it could not bind his interests. That impeachment of the debt has failed. It was said to have been for illegal and immoral purposes, and if it had been in its inception illegal and immoral the son would not be liable to pay the debt, and the zemindary would not be the subject of sale. But that ground has entirely failed. The Subordinate Judge, who examined the evidence with the greatest care, correctly came to the conclusion that there was no satisfactory evidence that the debt was contracted for illegal or immoral purposes, and there is no doubt in the case that the original creditor advanced the Rs.2000 *bonâ fide*, and that it was a debt contracted by the father and coming within the ordinary rule of Hindu law with reference to an estate such as is now before their Lordships, that the son would be liable for the debt contracted by the father to the extent of the assets coming to him by descent from the father, and that his interest in the zemindary was liable, and might be sold for the satisfaction of that debt. The son, having failed to get the protection which he sought by his petition, instituted this suit, impeaching the debt, and seeking to be absolutely relieved from it. He has failed entirely in that, and their Lordships quite

agree with the judgment of the subordinate Court that, failing in that, his whole suit failed. The Plaintiff based his case upon the impeachment of the debt, and upon that alone, and failing in that allegation and that impeachment, the whole suit fails. That being the case, there might have been a sale of this estate under this decree, including the whole interest or of so much as was necessary. Upon the documents their Lordships have arrived at the conclusion that the Court intended to sell, and that the Court did sell, the whole estate, and not any partial interest in it.

Their Lordships do not intend in any way to depart from principles which they have acted upon in prior cases. The High Court, in dealing with the case, entirely agrees with the Subordinate Judge in the view which he took of the evidence, and would so far confirm his ruling; but it says, "but in view of the recent ruling of the Privy Council that a sale in execution of a money decree of the right, title, and interest of an Hindu father, will affect only the interests of the father, the Plaintiff is entitled to a declaration that the sale in execution of the decree of 1879 has affected the interests of the first Defendant only, and not those of the Plaintiff."

The "recent ruling" referred to is probably that to be found in *Hurdey Narain* v. *Rooder Perkash* (1).

The High Court seems to have acted on the rule so laid down as a rigid rule of law, apparently applicable to this particular case. But the distinction is obvious. In *Hurdey Narain's Case*, all the documents shewed that the Court intended to sell, and that it did sell nothing but the father's share—the share and interest that he would take on partition, and nothing beyond it—and this tribunal in that case puts it entirely upon the ground that everything shewed that the thing sold was "whatever rights and interests the said judgment debtor had in the property" and nothing else.

Their Lordships are of opinion that the decision of the Subordinate Judge was entirely right, and that the decision of the High Court was wrong in holding that less than the entirety of the estate was sold.

(1) Law Rep. 11 Ind. Ap. 28, 29. (S.C. I.L.R. 10 Cal. 626)

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Their Lordships, therefore, will humbly advise Her Majesty that the decision of the High Court varying the decision of the Subordinate Judge be reversed, that the appeal to the High Court be dismissed with costs, and that the decree of the Subordinate Judge be reinstated, and their Lordships give the Appellant the costs of this appeal.

Solicitors for the Appellant: *Rowcliffes, Rawle & Co.*

Reported also 14 R 16 Cal 223

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AND

MAHARAJAH LUCHMESWAR SINGH. . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Reported 14 R 25 Cal 898

Ejectment—Tenancy at a low and uniform Rental for Eighty Years—Original Grant of Tenancy for particular Purpose—Presumption.

Where in an action of ejectment between landlord and tenant the Defendant set up that he had been tenant for eighty years at a low and uniform rental, and that a binding agreement for a perpetual tenancy must be inferred therefrom:—

Held, that such agreement must be proved, or at least that the facts necessarily lead to such inference, which cannot arise where the tenancy was originally granted for a particular purpose and presumably ceased on its failure.

Distinguished 14 R 26 Cal 219, 220

APPEAL from a decree of the High Court (Aug. 28, 1886), affirming a decree of the District Judge of *Tirhoot* (July 14, 1885).

The Respondent sued for possession of, or, in the alternative, for the enhancement of rent of mouzah *Malinuggur* which the Appellant had held since 1798 subject to an annual payment of Rs.972, which had never varied.

Both Courts granted him the relief which he prayed.

The facts of the case are stated in the judgment of their Lordships.

Robinson, Q.C., and *Mayne*, for the Appellant, contended that the proper construction to be put upon the transaction of 1798

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was that the Government took possession of *Malinuggur* for a tenure terminable only at its own pleasure, at a fixed annual rent. The burden lay on the Plaintiff to shew that at some subsequent date that position was changed. No evidence to that effect was offered. The course of dealing between the parties led to a contrary presumption. It is improbable that the Government became a mere tenant at will: see sect. 49 of Regulation VIII. of 1793. It was not open to the Respondent to demand an enhancement of rents which have remained unchanged since the permanent settlement.

Cowie, Q.C., and *Doyne*, for the Respondent, contended that it lay on the Appellant to prove either an actual agreement for a perpetual tenancy or that such was the necessary inference from the circumstances. There were concurrent judgments to the effect that the Appellant had failed upon the first point. With regard to the other point, there was no single fact proved from which perpetuity could be inferred. There had been no adverse possession. Rent had been regularly paid, and as the grant had been made for a particular purpose, on failure of that purpose inferences arose, if any were needed, favourable to the Respondent rather than the Appellant. The Government could at any time have thrown up its tenancy. An intermediate tenure of the kind alleged—intermediate between zemindar and ryots—must be strictly proved. See *Rajah Sahib Perhlad Sein* v. *Doorgapershad Tewarree* (1).

Mayne, replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this dispute about the village of *Malinuggur* it appears that the Government of *India* have been in possession ever since the month of July, 1798. It is not disputed that during the whole of that time, and for long before, the village was part of the milkiut, that is, of the zemindary or proprietary estate of the

(1) 12 Moore, Ind. Ap. Ca. 331.

(2) 2 Ind 128 Pc
(3) 12 WR 14 Pc

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Darbhanga Raj. The Rajah now seeks to recover the property. The Government takes the ground that it has made to the Rajah, in some shape or other, either as a matter of account or as a matter of actual payment, one uniform payment for eighty years before this dispute arose, and they claim to be perpetual tenants of the village at a fixed rent. At one time, when they put in their written statement, the Government set up that there was an actual mokurruri lease granted to them, and they did so in perfect good faith, upon the ground that a document in the Collector's office, being the petition of the Rajah for permanent settlement, contained a description of *Malinuggur* as being the mokurruri property of the *East India Company.* It has however been found by both the Courts below that that description is an interpolation or a mistake of some kind, and that the true version of the petition is that which we have in the record, which, if their Lordships understand it rightly, is a copy of the original petition given out from the Collector's office to the Rajah, and found in the duftur of the Rajah. Therefore that contention is not now insisted upon; and their Lordships have it that in the petition of the Rajah for a permanent settlement, which contains a list of a very large number of mouzahs, there are a considerable number, about sixteen, specified as being held under mokurruri grants, and that the mouzah *Malinuggur* is not so specified.

But then the Government say that, whether there is or is not a lease, the true inference from the facts is that there was a binding agreement for a perpetual tenancy by them under the *Darbhanga Raj.* They insist very strongly that it would be irrational to suppose that for such a number of years the Rajah would have gone on accepting a payment which had come to be very far below the value of the land, unless he was bound by an agreement of that kind.

That leads their Lordships to consider under what circumstances possession was first taken by the *East India Company,* and their payment to the Raj settled on the basis on which it has been made for so many years.

It appears that this village of *Malinuggur* was part of a jaghir granted to one *Rajbullubh,* apparently by the *Nawab Nazim.* It

was granted certainly before the year 1764, and that was before the dewany of *Bengal, Behar*, and *Orissa* was taken over from the *Nawab Nazim* by the *East India Company*. Therefore the British Government found the jaghirdar in possession. In the year 1784 his position was apparently confirmed by a grant from the British Government. Nothing turns upon the special language of that grant, and it is only valuable as shewing what the position of the jaghirdar was at that time. It is clear that at that time the village was known to be part of the milkiut of the *Darbhanga Raj*. What exactly the relations were between the Rajah and the jaghirdar does not appear. But the jaghirdar was in possession, and of course was free of revenue.

In 1798 the Government desired to take the mouzah of *Malinuggur* for the purposes of a stud of horses which they were setting up, or had set up, in the immediate neighbourhood. *Rajbullubh* was quite willing that they should take his land, and he sent in an account of the revenues, extending over seventeen years, with a request to know what the Government would propose to pay him, and to see the form of the pottah that they proposed. Before anything further was done upon these negotiations the jaghirddar *Rajbullubh* died. The next step in the transaction was that the jaghir was attached, which was done immediately, in the month of July, 1798. Within a week apparently of *Rajbullubh's* death, the Company attached the jaghir, no doubt for the purpose of securing the revenue. Thus the Company got into possession.

The next step after that is the report of Mr. *Graham*, the agent of the Company, which bears date the 27th of August, 1798. After taking notice of what had passed with the jaghirdar, and of his death, and that the lands had been attached by the Government, he makes this proposal. He says: "I now propose, as the lands (being part of the milkiut of Rajah *Madho Singh*)" —that is *Darbhanga*—"will continue in the hands of Government until the conclusion of the decennial settlement, that it be recommended to the Governor-General in Council to put the lands appertaining to mouzahs *Malinuggur*"—and another village which we may leave out of consideration—"under charge of Captain *William Frazer*, the superintendent of the stud, at a net

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rent of Sicca Rs.1500 from the commencement of the ensuing Fusli year 1206"—that would be 1798 or 1799—"leaving it to the Collector to pay the malikana to Rajah *Madho Sing*," and so forth.

It would seem that what *Graham* advised was done. The Government were in possession; the decennial settlement was going on; the agent had come to a conclusion in his own mind what was a fair rent to pay for the village of *Malinuggur*; and he advises that the superintendent of the stud shall take possession and shall pay the amount which he had settled as fair. That seems to have been done, because, when we come to the permanent settlement, we find on the face of the Rajah's petition, and again on the face of an account in the Collector's office, which shews the sums payable to Rajah *Madho Singh* for the resumed jaghir mehal of *Rajbullubh*, that those sums, so far as they are due from *Malinuggur*, amount to the proportion attributable to *Malinuggur* of the Rs.1500 which Mr. *Graham* advised to be paid for the two villages. Upon that footing the permanent settlement was made. The Rajah was the proprietor. The Company were bound by the regulation to make the settlement with the proprietor. They did make that settlement, and, as far as their Lordships can judge, they made it exactly on the same footing on which they had been dealing with the village during the currency of the decennial settlement, that is to say, for the space of some two years before the permanent settlement was effected.

That is the whole of the contemporary evidence. There is no other evidence which bears upon the position of the parties excepting this, that we find that from that time forwards up to the year 1872 matters remained in precisely the same position. The Government continued in possession of the village; they continued to use the lands for the purpose of the stud; and they continued to be charged at the same rate as was entered in the petition and in the Collector's account.

In 1872 the Government came to the conclusion that they had better give up the stud, and it was accordingly given up, and the village has been used for ordinary agricultural purposes since that time. At that time the present Maharajah of *Darbhanga*

was an infant, and some three or four years after he attained his majority he demanded possession. The mode in which that demand was made, and the time at which it was made, have been observed on by the counsel for the Government; but in their Lordships' opinion, nothing whatever turns upon the correspondence which took place in the years 1881 and 1883; but whatever were the rights of the parties in 1872, when the stud was given up, precisely the same rights exist now.

Under these circumstances their Lordships think there is no substantial doubt that the Courts below, who have both decided that the Government cannot establish the inference that they are perpetual tenants, are right. The Government undoubtedly are tenants of the *Darbhanga Raj*. It is for them to shew why the landlord may not recover his property, and they can only do that by proving that there is some agreement between them and their landlord that they shall have something more than the ordinary tenancy at will or from year to year. All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of these things there would be strength in that argument, but as the origin of them is known the argument loses its force. In fact, the possession is not difficult to explain in other ways. It is not the business of the Plaintiff to explain the possession; it is the business of the Defendants to shew that it leads to the inference of a perpetual tenancy. But even if the *onus probandi* did not lie so clearly on the Defendants, their Lordships think that the reasonable explanation has been given by the Courts below, and that there probably was some understanding, which might have amounted to an agreement, that the Government should have this land for the purposes of a stud, not that they should have it for ordinary agricultural or commercial purposes, to make what money they could of it. Thus the moment it ceased to be occupied for the purposes of a stud the rights of the landlord would revert, and it was he, and not the Government, who would have the benefit of the increased value of the land. That hypothesis seems more probable than the alternative one, and it is, of course, always more satisfactory when we can arrive at a reasonable explanation of the facts, instead of merely

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resting the case upon the failure of one party to make out his case against the other.

The result is that their Lordships think the Courts below were quite right, and that this appeal must be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Solicitors for Appellant: *Solicitor, India Office.*

Solicitor for Respondent: *Sanderson & Holland.*

Reported also I.L.R. 11 All. 136

J. C.* 1888 Nov. 2, 3.

HARI RAM AND RAJA RAM . . . . . PLAINTIFFS;

AND

SHEODIAL RAM AND HARDIAL RAM . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Cited I.L.R. 18 Cal. 560.

Registration—Act VIII. of 1871, *s.* 28.

Sect. 28 of Act VIII. of 1871 is satisfied by registration being effected in the place where any portion of the registered property is situated. It is not necessary that such portion should be a substantial one.

I.L.R. 7 All. 590

APPEAL from a decree of the High Court (Jan. 9, 1885), reversing a decree of the District Judge of *Gorakhpur* (Dec. 24, 1881).

The facts are stated in the judgment of their Lordships. The question in the appeal was one of construction of the *Registration Act* (VIII. of 1871).

The material portion of the judgment of Chief Justice *Petheram* was as follows:—

"Now here we have an instrument purporting to create a vested interest in immoveable property of greater value than Rs.100, and therefore it required registration in the place referred to in sect. 28, namely, the office of a sub-registrar, within whose sub-district 'the whole or some portion of the property to which' it related was situate. Now, since Mr. *Brooke* had about Rs.500 worth of land at *Patna*, which was hypothecated in the bond, 'some portion' of the property to which the bond related was undoubtedly situate in the place of registration. And, there-

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fore, if the words of sect. 28 are to be taken in their literal sense, the bond must be regarded as having been properly registered. But it seems to me that to take them literally would be to defeat the real object which the Legislature had in view when it enacted the section. That object was that the registration of a document should have some reference to the locality of the property to which the document relates. The section first speaks of the sub-district in which the whole of the property is situate. But in a case like the present, in which there is a large and valuable property in one sub-district, and another small piece of land situate at a distance, it seems to me that to allow registration of a document affecting both properties in the place where the smaller and less valuable is situate, would be inconsistent with the implied intention of the Legislature that registration should be made with reference to the locality of the property. What, then, is the rule to be followed in cases where a literal interpretation of the terms of an enactment would defeat the intention with which the enactment was made? Mr. *Wilberforce* in his book on Statute Law (1881) has expressed the rule in clear language, and has collected the cases by which it has been established. He says (p. 131):—'It has often been laid down that while words are to be understood in their plain and ordinary sense, they must not be read so literally as to defeat the object of an enactment. Acting on this principle, the Courts have, both in ancient and modern times, given some words a wider meaning than they usually bear, and have restricted or modified the meaning of others.' He cites cases which establish this principle, and in some of which the literal meaning has been enlarged, while in others it has been restricted by the Courts. In the case before us we must first consider whether the intention of the Legislature cannot be effected without either enlarging or restricting the meaning of the terms which it has used. For the reasons which I have already given, I do not think that this is possible. If the words in sect. 28 of Act VIII. of 1871, 'some portion of the property,' are construed to mean some substantial portion, then the obvious intention of the Legislature is effected, and registration is kept to the place where a man's property is known to be situate. Now the property of Mr. *Brooke* at *Patna* cannot

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be regarded as a substantial portion of the whole property hypothecated, and therefore I am of opinion that the deed must be considered invalid."

Graham, Q.C., and *Branson*, for the Appellants.

Cowie, Q.C., and *Mayne*, for the Respondents.

1888 Nov. 3.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit which is the subject of this appeal was brought by the Plaintiffs, who are bankers, against the present Respondents, who are also bankers, and against a Mr. *Brooke*. The Plaintiffs, the Appellants, sought to recover a sum of Rs.79,655 as principal and interest which they alleged to be due to them in respect of a mortgage executed by *Brooke* on the 20th of May, 1873, the Plaintiffs alleging that at that date *Brooke* adjusted his account and executed a mortgage for securing Rs.3,49,504–4. There is no question that this mortgage was executed by *Brooke*. The mortgage stated that there had been an adjustment of accounts between *Brooke* and the Plaintiffs, and it was given to secure the money which was then due on the account, together with a sum of Rs.90,000 to be advanced by the Plaintiffs to *Brooke* for defraying necessary expenses of an indigo concern from May, 1873, to October of the said year. The defence of the present Respondents, with whom alone their Lordships have now to deal, was twofold. Having become the purchasers of part of the mortgage property, another part of it having been previously sold, they objected that this mortgage of May, 1873, was not duly registered; and they have also objected that the whole of the sum of Rs 90,000 was not advanced before the 1st of October, 1873, but a portion only was advanced, leaving a sum of about Rs.30,000 which they say was subsequently advanced, and is therefore not covered by the mortgage.

With reference to the objection as to the non-registration of the mortgage deed, it appears from the schedule to the deed that it was a mortgage of a considerable property, only a portion of which, stated to be 500 yards of land built upon, was situate in

the district of *Patna*; the other part, and, of course, much the largest part of the property, was situate in other districts. Act VIII. of 1871, with regard to registration, contains this provision in sect. 28: "Save as in this part otherwise provided, every document mentioned in sect. 17, clauses 1, 2, 3, and 4, and sect. 18, clauses 1, 2, 3, and 4, shall be presented for registration in the office of a sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situate." And this was an instrument which came within the provisions of this section. The registration was made in the district of *Patna*, where the 500 yards of land were situate. The Subordinate Judge held that this was a sufficient registration. On appeal to the High Court, the learned Judges of that Court, the Chief Justice and another Judge, held that it was not; and the ground upon which they came to that decision is stated by the Chief Justice to be this:—"In a case like the present, in which there is a large and valuable property in one sub-district, and another small piece of land situate at a distance, it seems to me that to allow registration of a document affecting both properties in the place where the smaller and less valuable is situate would be inconsistent with the implied intention of the Legislature that registration should be made with reference to the locality of the property,"—that a literal interpretation of the terms of the section ought not to be adopted; and it was the intention of the Legislature that the registration should take place where some substantial portion of the property was situate.

It appears to their Lordships that this judgment puts a construction upon sect. 28 which cannot be supported, and in fact imputes to the Legislature an intention which does not appear from the provisions of the *Registration Act* to have been their intention. The words, if we take them in their ordinary sense, "within whose district the whole or some portion of the property to which such document relates is situate," certainly do not shew an intention that there should be any inquiry as to whether the place where the document was registered was the place where what may be called some substantial portion of the property is situate; and an inquiry of that kind might very frequently lead to considerable difficulty. But the intention of the Act is appa-

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rent from the subsequent provisions. In sect. 64 it is provided that "every sub-registrar on registering a document relating to immovable property not wholly situate in his own sub-district shall make a memorandum thereof, and of the indorsement and certificate thereon, and send the same to every other sub-registrar subordinate to the same registrar as himself in whose sub-district any part of such property is situate;" and then, such sub-registrar shall file the memorandum in his book No. 1." Sect. 65 and sect. 66 contain similar provisions where the property is situate in more districts than one. Thus the information is conveyed to the registrars or sub-registrars of every place where the document ought to be registered, and thus all the information which it is the object of a register to afford is to be found in those different places. It appears to have been the intention of the Legislature in making these provisions that it should be sufficient that the registration be made by the parties, as is stated in sect. 28, in the place where some portion of the property—not a substantial portion, but where any portion of the property is situate, leaving it to the office to do the rest. These provisions are calculated to effect that, and are in accordance with what might reasonably be supposed to be the intention of the Legislature.

Their Lordships, therefore, are of opinion that the decision of the High Court with regard to the want of registration of this mortgage cannot be supported. The consequence ordinarily would be that the decree of the High Court reversing the decree of the Judge of *Gorakhpur*, which was given in favour of the Plaintiffs, would be reversed, and the decision of the Judge of *Gorakhpur* would stand. But their Lordships allowed the learned counsel for the Respondents to submit to them, and argue, that the decision of the Judge of *Gorakhpur* was wrong, and consequently, that, although the High Court had reversed it on a ground which cannot be supported, still, it ought to be reversed, and the decree reversing it ought to stand.

Now, it is to be observed that the Judge of *Gorakhpur* had very carefully considered the whole of the case, and had come to the conclusion that the balance which he found due to the Plaintiffs, and which they were entitled to recover as mortgagees,

was really due to them. The objection taken to his finding appears to be of a twofold character. It is said that only moneys which had actually been advanced by the Plaintiffs before the 1st of October, 1873, can be recovered by the mortgagees, and that the advances out of the Rs.90,000 subsequent to that day did not become the subject of the mortgage. That depends upon the construction of the mortgage deed. Their Lordships think that the mortgage was intended to cover the whole advance of the Rs.90,000; and whether it was advanced before the 1st of October, 1873, or not, if the parties, that is Mr. *Brooke* and the mortgagees, thought fit between themselves to allow a portion of that Rs.90,000 not to be immediately advanced, but to remain in the hands of the Plaintiffs in a deposit account in such a way that he could draw upon them and obtain the money at any time, that it was really covered by the mortgage, and it is not an answer to the claim of the mortgagees in respect of the Rs.90,000, that the whole of it was not advanced before the 1st of October, 1873. The way in which the Defendants seek to avail themselves of this objection is that they say that if they are right in that contention, and the mortgage only covered what was actually advanced before the 1st of October, 1873, the accounts shew that the whole of the mortgage was satisfied, and consequently that the Plaintiffs are not entitled to recover upon it as they claim. Their Lordships think that this cannot be allowed.

Then it is also contended that this money was not advanced. Mr. *Mayne* has argued that there is no evidence of it, but one of the Defendants when examined said he did not deny that the money was advanced; and there cannot be any doubt that the money was actually advanced.

Another answer to this contention on the part of the Defendants appears to be this: On the 17th of September, 1874, Mr. *Brooke*, the mortgagor, settled an account with the Plaintiffs, and the whole of the matters between them was gone into, and a balance was then agreed upon as due from him to the Plaintiffs, including all these different items which would be the subject of the mortgage. The Defendants acquired no interest in the estate till January, 1875, when they took a conveyance from *Brooke*. Their Lordships are of opinion that the Defendants are bound by

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the account which Mr. *Brooke* so settled, and that what he, when he settled that account, agreed to be due in respect of the mortgage, and the way in which the different payments appear to be appropriated, cannot be now disputed. They do not think it necessary to go into the evidence which Mr. *Cowie*, and Mr. *Mayne* more especially, have referred to on this subject: but they think that if that evidence was gone into it would support the contention of the Plaintiffs that the amount which the Judge of *Gorakhpur* has found to be due is really due to the Plaintiffs, and is the subject of the mortgage, and the Plaintiffs are entitled to recover it as mortgagees in the way in which they claim.

The case appears to have been very carefully investigated by the Subordinate Judge, and unless their Lordships could see that he was wrong in the way in which he has dealt with the accounts, and the various facts in the case, they would not come to the conclusion that his decree ought to have been reversed by the High Court. The result is that their Lordships will humbly advise Her Majesty that the decree of the High Court should be reversed, and the appeal thereto dismissed with costs and the decree of the Judge of *Gorakhpur* varied by omitting that part of it which directs the deed of sale to be cancelled. The costs of this appeal will be paid by the Respondents.

Solicitors for Appellants: *Watkins & Lattey.*
Solicitors for Respondents: *Barrow & Rogers.*

Reported ILR 16 Cal 468 Cond

MAJID HOSAIN . . . . . PLAINTIFF; J. C.* 1888

AND

MUSSAMAT FAZL-UN-NISSA . . . . DEFENDANT. Nov. 16.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Registration—Attendance of Registrar at Grantor's House.

Where the sole objection to the validity of the registration of a grant of a village was that the grantor did not personally attend at the office of the registrar, but that the latter attended at the house of the grantor (a purdanasheen), and there received the deed, a copy, and her acknowledgment of its execution:—

Held, that the registration was effective.

Reported 6 Indian Law Rep. 7

APPEAL from a decree of the Judicial Commissioner (August 26, 1885) affirming a decree of the District Judge of *Lucknow* (June 1, 1885).

The question decided in this appeal was as to the legality of the registration of a deed of gift dated the 21st of March, 1871.

Doyne, for the Appellants.

C. W. Arathoon, for the Respondent, was not called upon.

The judgment of their Lordships was delivered by

LORD FITZGERALD:—

Their Lordships are of opinion that this objection ought not to prevail.

Kutb-un-nissa made a grant to her adopted daughter of the village of *Nizampur*, which required to be executed three months before her death, and to be registered within a month after the date of its execution. The objection taken to the instrument was that it was not presented at the office of the registrar, but that the registrar was sent for to *Kutb-un-nissa's* residence, where the

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deed was executed and registered. She appears to have been a pardanasheen; and the mode in which registration was effected was in this manner: She sent for the pargana registrar, whose name is given as *Kali Charan*, and he attended at her house. Her house appears to be near the office of the pargana registrar, and actually within the very village which was the subject of the grant. *Kali Charan* having attended her, and having the deed acknowledged in his presence, word for word, by the granting party, and having examined it, it was handed to him for registration.

The record of registration by the registrar is as follows:—

"No. 131, Volume 2. On Tuesday, the 21st March, 1871, at 10 A.M., *Musammat Kutb-un-nissa*, aged about sixty-five years, wife of *Jahangir Bakhsh*, talukdar of *Guaria*, sent for me at her house in the village *Gauria*. She got this document executed in the presence of *Ganesh Bakhsh* and of *Beni Parshad*, the witnesses named on the margin, and having presented it for registration, admitted its execution on her part, and attested the contents word for word, and having seated herself on the threshold of her doorway, marked the document with her own hand in my presence. *Musammat Amiran*, wife of *Mahbub Ali*, resident of *Amethi*, identified the obligor; therefore having registered this deed, drawn up on a blue impressed stamp of the value of Rs.16, it is returned in original through *Ganesh Bakhsh*, a copy thereof having been kept, and Rs.5, on account of fees having been received.

"(Sd.) *Kali Charan*,
"Pargana Registrar of *Mohanlalganj*.
"No. 26."

Their Lordships presume part of his duty was either to make a copy himself, or to examine the copy made. Having thus got the original deed into his hands, and marked it, and having had that deed duly acknowledged so as to give the best testimony of its execution by the grantor, and having examined the copy which was either prepared by himself or prepared for him, and examined it word for word with the deed, his next step is to take those instruments to his office; to enter the registration

in the book; and to file the copy in the proper pargana office of the district.

The sole objection to that registration upon which their Lordships are asked to invalidate that deed is, that the grantor did not go to the office of the pargana registrar. He came to her as a matter of convenience, and received the deed and copy at her house. That is the sole objection; and upon that their Lordships are asked to declare this registration to be null and void, and consequently that the deed is worthless.

The registration is to be in accordance with the rules for the time being in force, and the registration is to be judged by those rules, and those alone. The first rule is this: "There must in future be only one registrar in each pargana for the registration of deeds relating to real property, who shall be especially appointed for that purpose, and styled the pargana registrar. He may, of course, register any other contracts that can be registered by ordinary registrars, but no other registrar may register any contract regarding immovable property." He certainly could not be more clearly ear-marked as the proper and only registrar to register this deed under the circumstances. But there was something more to be provided for, and accordingly their Lordships find this in rule 2: "All deeds regarding real property, or in any way creating liens and incumbrances upon it, must be registered at the office of the registrar"—that is to say, the registrar previously named, namely the pargana registrar —"of the pargana in which the property is situated, and must be copied in full. If for any special reason parties at a place distant from the property wish to register a deed affecting it, they must go to the tahsildar or sudder registrar, who will register it, and will immediately transmit a copy to be registered at the office of the pargana in which the property is situated, charging and transmitting an extra fee for the same." That addition to or alteration of the second rule provides for a case of public convenience. These districts are no doubt very large in *India*, and it may be a very great inconvenience and expense for parties by reason of distance to attend at the pargana office, and then by this rule they get the facility, in place of attending at the pargana office, of going before the tahsildar or the sudder

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officer, who receives the deed, and makes the copy, and transmits it to the pargana registrar. It is obvious that this is not one of those exceptional cases, for the lady did not live at a distance from the pargana district. She was within it, and a very short distance from the office of the registrar. The registration, in fact, took place at the office of the pargana registrar, though the officer attended to receive the deed, to receive its acknowledgment, and to compare the deed with the copy. He brought it all to his own office, and the registration is, in fact, the recording of that copy in the office of the pargana registrar, all the other requisites provided by the rule having been otherwise complied with.

Their Lordships are of opinion, without going further, that the registration was effective, complete, and full, and that the deed ought not to be disturbed on that account.

There is said to be a contradictory provision at the conclusion of clause 2. Their Lordships do not find it necessary to express any opinion upon that. Their Lordships understand that rule has been superseded; but at any rate they do not find it necessary to express any opinion on the question whether there is any contradiction between the two clauses. They are of opinion here that the registration was before the proper officer, and potentially and substantially a registration at the office of the pargana district.

Their Lordships will therefore humbly recommend Her Majesty that the appeal should be dismissed with costs.

Solicitors for Appellants: *Barrow & Rogers.*
Solicitors for Respondent: *T. L. Wilson & Co.*

MOHIMA CHUNDAR MOZOOMDAR AND OTHERS . . . . . } PLAINTIFFS;

AND

MOHESH CHUNDAR NEOGI AND OTHERS DEFENDANTS.

J. C.* 1888 Nov. 20.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Limitation—Act XV. of 1877, *Art.* 142—*Onus Probandi.*

It is not the law that where Plaintiffs are shewn to be the rightful owners of the land in suit, it is for the ryot Defendants to shew that they are entitled to retain possession :—

Held, on the evidence in this case, that the onus was on the Plaintiffs to prove their possession at some time within twelve years prior to suit, under art. 142 of Act XV. of 1877.

APPEAL from a decree of the High Court (March 15, 1886), reversing a decree of the Subordinate Judge of *Patna* (June 10, 1884).

The facts are stated in the judgment of their Lordships.

C. W. Arathoon, for the Appellants.

Doyne, and *Mayne*, for the Respondents.

The judgment of their Lordships was delivered by

MR. STEPHEN WOULFE FLANAGAN :—

This is an appeal from a decree of the High Court of *Bengal* dated the 6th of March, 1886, reversing a decree of the lower Court of the 10th of June, 1884. The action in this case was brought to recover possession of certain lands which need not be particularly described. It is sufficient to say that they are lands in the possession of the Respondents. A great deal of evidence has been given on the one side and the other as to the original title to these lands which were claimed by the Plaintiffs as part of "*Rajapore*," and by the Defendants as part of "*Machuakándi*." It appears to be unnecessary to go into that title. The question

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is whether, assuming the Plaintiffs to have been at some time lawfully in possession, the plaint which was filed on the 30th of July, 1883, was filed within twelve years as required by the 42nd article of the *Limitation Act* of 1877, from the date of their dispossession or discontinuance of possession.

It is conceded by the Plaintiffs that in fact they were dispossessed, or their possession was discontinued from the year 1875, a period of eight or nine years prior to the bringing of this suit, and that the Defendants have ever since been in undisturbed possession; but they allege that they were in possession within four years or more immediately prior to that date.

Now, the only question in this case being one of fact with reference to the *Limitation Act*, it will be well to turn to the judgment of the Judge of the lower Court and see upon what grounds he based his decision in favour of the Plaintiffs and to contrast these with the reasons of the High Court reversing his decision. After referring to certain chittas (which in their Lordships' opinion are not evidence of possession within the time in question) he goes to the substantial question upon which his decision is based. He says: "It is also to be observed that the title of the Defendants Nos. 1, 3, 4, and 5, to the mouzah *Machuakandi*, was created just after the agrarian disturbance in this district. This circumstance is alone sufficient to lead me to believe that the Defendants took the advantage of the opportunity to revive their lost right to the mouzah *Machuakandi* by inducing the ryots of the chur *Rajapore* to admit them as their landlords." Then he says: "It was argued by the Defendants' pleader, that the Plaintiffs failed to prove collection of rent from their alleged tenants, as they did not file any collection papers, and their loss is not properly accounted for. It is proved by the Plaintiff No. 1, and the Plaintiffs' witnesses, that in 1279 the Plaintiffs' cutchery house was blown down by rain and storm, and greater part of the papers were lost, and the Defendants' witness No. 1 deposed that occasionally he and his brother *Kali Komul* used to take papers from their ijmali serishta, and he made over certain papers to his co-sharers at the time of instituting this suit."

Now, merely making a short comment on the first passage

which has been just read, it appears to their Lordships that the question for decision is not whether or not the title of the Defendants was created just after the disturbance or otherwise, but when were the Plaintiffs dispossessed or when did they discontinue possession? The Plaintiffs by their own witnesses have admitted, in fact, that their possession was discontinued, at all events, in July, 1875. By one of their witnesses, their principal witness, gomashta *Panaulla*, it appears that in fact they were dispossessed in the year 1873. Many witnesses were examined on behalf of the Plaintiffs in this case, to prove their possession within the four years prior to 1875, but it is not necessary to go through their evidence in detail. These witnesses may be grouped in fact into two classes: witnesses who either are or have been in the employment of the Plaintiffs, or witnesses who have been tenants upon the lands—witnesses who in fact had been dispossessed by the Respondents, whose evidence therefore, when it has to be balanced against other evidence of a contrary tendency, is subject to the remark that it is in accordance with their interests. It is a very singular fact in this case that there appears to be no documentary evidence whatsoever in support of the case which has been made by the Plaintiffs here, to shew their possession or their receipt of rent for a period within twelve years before the time when the action was brought. Many documents were proved in support of their title to the lands some years previous to that date, but none to prove their possession. The statement by the witnesses in reference to the cyclone in the year 1872 and the destruction of their house and the place where they alleged all the papers were kept, and the scattering of those papers, is certainly one which cannot be relied on in a case of this kind as proving that documentary evidence of value in support of their possession had ever existed, nor as affording a sufficient reason for its non-production. It is also a singular circumstance in reference to the destruction of their cutcherry house by the cyclone in the year 1872 that all the earlier papers, namely, the papers which were referred to at great length in the case as proving the title of the Plaintiffs as distinguished from their possession are all forthcoming. How it is that they were not destroyed with all the other papers in that cyclone is not

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explained, but it is a remarkable thing, and throws the greatest possible doubt and suspicion on the allegation in reference to the destruction of the papers, that papers of that class should be all forthcoming, and that the material papers, those relating to possession, are not produced at all. Bearing in mind that the lands are all cultivated and in the possession of tenants, there is also another class of papers which certainly ought to have been produced, and have been either in the possession of the Plaintiffs, if they really existed, or in the possession of their tenants, but which have not been produced. These papers are, amongst others, the receipts for the rents alleged by the Plaintiffs and their tenants to have been paid for the years between the cyclone of 1872 and the year 1875, when they allege their possession first determined; these, although alleged to exist, were not produced. The learned Judge then says:—"When I shewed above that the Plaintiffs are the rightful owners of the disputed land, it is for the ryot defendants to shew that they are entitled to retain possession of these lands." That, as a proposition of law, is one which hardly meets with the approval of their Lordships. This is in reality what in *England* would be called an action for ejectment, and in all actions for ejectment where the Defendants are admittedly in possession, and *à fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the Plaintiff to prove his own title. The Plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that in this case the onus is thrown upon the Plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the Defendants to shew that in fact the Plaintiffs were so dispossessed.

Now, turning from the judgment of the Judge of the Court below, to the reasons which were given by the Judges of the High Court for the decree they made, reversing the decision of the Court below and dismissing the Plaintiffs' suit with costs, the Court says, in reference to the Law of Limitation: "This suit

was instituted in the month of Srabun, 1290, and it was therefore for the Plaintiffs to shew that they had been in possession of the land in suit since Srabun, 1278. Now, admittedly, according to the Plaintiffs, they were ousted in the year 1282; that is, eight years before the institution of the suit. And we find from the evidence, and particularly from the evidence of their gomashta *Panaulla*, that virtually they admit having been dispossessed so far back as 1280." That would be the year 1873. "In that year, according to the evidence for the Plaintiffs, their tenants first grew refractory, and it does not appear that the Plaintiffs ever collected rent, or were in possession after that year. That being so, it appears to us that a very heavy onus lay upon them to prove that they were in possession during the two years previous, that is, from 1278" —with that observation their Lordships entirely concur—"and we are further of opinion that they have not succeeded in proving this." In that observation their Lordships also concur. "The only documentary evidence adduced on this point is a chitta of the year 1280. This chitta purports to have been prepared by one *Tamiz Sircar*, who, though alive, has not been called." What its contents may have been it is impossible from the record here to collect, but, at all events, this chitta having been prepared by *Tamiz Sircar*, who appears to be alive, *Tamiz Sircar* was not produced. "His signature on the paper has been proved by the gomashta *Panaulla*. But whether the chitta was really prepared by *Tamiz Sircar*, and under what circumstances, and how far it would be evidence of possession, are matters upon which there is really no evidence. This being so, it may be said that, practically, there is no documentary evidence whatever of the Plaintiffs' possession." Then the Court goes on to say: "No dakhilas, kabuliyats, or pottahs have been put in." Their Lordships have already made a comment as to the non-production of some of these documents. "The only evidence on the question of possession consists of certain oral statements made by the servants and tenants of the Plaintiffs. These tenants admit that they are now holding the lands of usli *Rajapore*, and that they would benefit if the Plaintiffs succeed in this suit. We think that very little reliance can be placed upon the evidence of such witnesses, unsupported as they are by a single scrap of documen-

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tary evidence." Then the learned Judges, commenting on the manner in which the absence of documentary evidence is attempted to be accounted for, namely by a reference to the cyclone, and the suggestion that one of the Defendants having become a lunatic, he had got possession of some material papers; but why the papers, whether in his possession or that of his family, if the papers ever got in his possession, should not have been produced and proved, has not been accounted for or explained in any way, say: "We think that neither of these reasons is satisfactory; and in the absence of better evidence, we think the Plaintiffs have not discharged the onus that lay upon them." Then the Judges of the High Court go on to say: "Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject of the proceedings under sect. 530, Code of Criminal Procedure, the Plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to shew where these ten or fifteen pakhis were situated, the Plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the mere fact that the Plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred." It appears to their Lordships that the High Court, in making that observation in reference to the criminal proceedings, must have mistaken the decision of the magistrates, because so far as appears from the judgment in that case, it would seem that in point of fact the magistrate finds that for a period of at least four years prior to the institution of those proceedings there had been peaceable possession on the part of the owners or ryots or tenants of the land of mouzah *Machuakandi*, and this finding, so far from being in support of any contention that these particular lands, whatever they may have been, were in the possession of the tenants or ryots of *Rajapore*, is distinctly to the contrary. Upon the whole, in this case, their Lordships, without going further into the matter, or considering the Defendants' evidence, which is, however, cogent to shew that they have in fact been in possession for more than twelve years prior to the filing of the plaint, are of opinion that the appeal from the decision of the

High Court of *Bengal* should be dismissed, and the decree appealed from affirmed, and they will humbly advise Her Majesty accordingly. The Appellants will pay the costs of the appeal.

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Solicitors for Appellants: *T. L. Wilson & Co.*
Solicitors for Respondents: *Oehme, Summerhays, & Co.*

Reported also I.L.R. 16 Cal 383

SREEMUTTY KRISTOROMONEY DOSSEE PLAINTIFF;

AND

MAHARAJAH NORENDRO KRISHNA BAHADOOR AND OTHERS . . . . . DEFENDANTS.

J. C.* 1888 *Nov.* 6, 24.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Cited I.L.R. 23 Bom 24 (Sg) I.L.R. 23 Cal 566 I.L.R. 20 Mad 458

Hindu Law—Estate subject to Defeasance—Gift over—Donees in existence at Date of Gift.

A Hindu cannot create an estate of inheritance unknown to the Hindu law. He may, however, create an absolute estate subject to be defeated by a subsequent event, provided, first, that the event must happen if at all immediately on the close of a life in being at the time of the gift; secondly, that the gift over must be in favour of somebody in existence at the time of the gift.

Reprd I.L.R. 20 Cal 936 — 19 Bom 405 — 18 Mad 254 — 12 — 400 Not

A Hindu testator gave the residue of his estate to his executors in trust to pay the rents and profits thereof to his daughter during her lifetime, after her death in trust to pay, assign, and convey the residue to his two half-brothers in equal moieties, and to the heir or heirs male of their or either of their body, in failure of which in trust to give the same to the son or sons of his daughter. In a suit by the daughter after the death of one of the half-brothers against the surviving half-brother, his six surviving sons and the representative of one deceased, the two sons of the deceased half-brother, and her own six sons; it appeared that both half-brothers survived the testator, that three sons of the surviving brother, including one deceased, were born during the testator's lifetime, the remaining four, together with the sons of the deceased brother, were born after his death, and that the six sons of the Plaintiff were also born after his death:—

See I.L.R. 7 Cal: 304 (Sg) 10 C.L.R. 349 (Sg) L.R. 8 I.A. 46 I.L.R. 12 Mad 400

Held, that, according to the true construction of the will, the gift of the residue so far as it purported to confer an estate of inheritance on the testator's half-brothers and the heirs male of their bodies was contrary to law

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, and SIR RICHARD COUCH.

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and void; that in the events which happened the gift to the Plaintiff's sons was incapable of taking effect; that each of the half-brothers took an estate for life in one moiety of the residue in remainder expectant on the death of the Plaintiff; that on the death of the half-brother the inheritance of his moiety devolved on the Plaintiff as her father's heir.

APPEAL from a decree of the High Court (Dec. 1, 1886).

The question decided in this appeal was as to the true construction of the residuary devise contained in the will of Rajah *Jadubendro Krishna Bahadoor*, and set out in their Lordships' judgment.

The suit was brought by the Appellant against all parties interested under the residuary devise to have the same construed, and the rights of the parties declared.

The Appellant contended that, having regard to the intention of the testator, she became entitled to one moiety of his property for the estate of a Hindu daughter therein on the death of his half-brother, *Nreependro Krishna*, and was entitled also to receive during her lifetime the income of the whole estate, including that moiety.

The two sons and heirs of *Nreependro*, deceased, resisted the former portion of this claim on the ground that the testator's half-brothers took an absolute estate subject to the Appellant's life interest, and subject to be divested in case they should die without leaving an heir or heirs male of their or either of their body living at their death.

The sons of *Norendro* (the other and living half-brother) added to this contention, the further and alternative construction, that if the half-brothers did not take an absolute interest, subject as aforesaid, they, as sons of a half-brother, were objects of the clause in the will "to the heir or heirs male of their or either of their body," they having been in existence at the time of the testator's death.

The six sons of the Appellant contended that the testator's intention was to create estates in his half-brothers descendible to the heirs male of their respective bodies and to no other heirs, and that, according to Hindu law, no such estates could legally be created. Assuming a gift of life estates to the half-brothers, with remainders to such persons as at the time of the death of

either of them answered the description of heirs male of his body, such remainder, they contended, was void, as being a gift to a class of whom some members might not be capable of taking. They claimed as heirs of the testator in reversion immediately expectant on the death of their mother, all of his estate which was not validly disposed of by the will.

The material part of the judgment of the High Court (*Petheram*, C.J., and *Macpherson*, J.) was as follows:—

"The contention of the Plaintiff is that this is the gift of an estate to her two uncles, more limited in its nature than the general law of succession would confer, and that the effect of it is to give the estate to them, limiting the descent in their male line only, and so to create an estate repugnant to Hindu law, and therefore void.

"The rule established in the *Tagore Case* is quoted by Mr. Justice *Wilson* in this form, and I have no doubt he quotes it correctly:—'If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law.'

"The first taker would, in this case, take for his lifetime, because 'the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which the gift confers is void.'

"The rule of law, as established by the *Tagore Case*, appears to be, that inasmuch as you cannot give an estate or any interest in it to a person not in existence at the death of the testator, you must give the entire estate with all its ordinary incidents of devolution to the person to whom it is to be given, because anything which is less than that limits his power of disposal over the estate, and therefore gives an interest to some particular line of succession that comes after him to the exclusion of others. This appears to be the rule, and it is said to apply to this case because

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the words 'to the heir or heirs male of their or either of their body,' which immediately follow the devise to the two half-brothers, are words of limitation, and that such a disposition was an attempt to create in perpetuity an estate, in violation of the rule of succession according to Hindu law, somewhat similar to an estate tail, by which this property would devolve from generation to generation in the male line to the exclusion of all females; and as that was not a gift of the entire estate to the first devisee, the devise beyond the interest of the first devisee must be limited by the ruling in the *Tagore Case* to the life interest coming thereafter, and that, consequently, one of the brothers, who had no sons at the time of the testator's death, having died, there was an intestacy as to one moiety of the estate, and that the Plaintiff is entitled to a decree as to that.

"Now, as I said before, the first question for us to consider is, whether that is the meaning of the testator, whether that is the meaning to be collected from the whole of the will. Having regard to the whole of the will, it seems to us that the testator's intention, when he made this will, was that, in the event of his two half-brothers (or either of them) living at the time of his death, having male issue, the estate should go to them in equal moities, but in the event of either of them dying, with reference to their issue, in the same condition that the testator was, that is to say, leaving no son, his own daughter should take the estate in preference to the daughters or widow of his half-brothers; but all words, so far as we can ascertain, indicate that his intention was, that the estate, when vested in his half-brothers, should be an absolute estate and all that he had to give; but that, in the event of their not having any sons at the time of their death, the estate should revert to the son or sons of his daughter, and that they should take the same estate as the testator's half-brothers would have taken in the first instance.

"Let us examine what the words are from which we come to that conclusion. It is necessary that there should be a verbal criticism of the language employed. The first devise is the devise of the income to the daughter, and as to that, as I have said before, there is no dispute; and then comes a direction to the trustees, that upon the death of the daughter they are to pay

over any cash that there may be in existence, and assign and convey the residue of the estate to his two half-brothers. It seems to us that the very use of the word 'pay' indicates that the intention of the testator was that the interest which the brothers were to take with the property so handed over to them was the entire interest in the property at the time. The fact of the trustees handing over the cash, and conveying the estate to the half-brothers of the testator is inconsistent with their handing over anything else than the whole estate; and therefore that the use of the words 'to the heir or heirs male of their or either of their body' is inconsistent with that view, if it has a tendency to limit that estate in any way.

"But when one comes to examine these words closely, so far from their being inconsistent with, they rather support that view of the meaning of the other words; and for this reason, as I said before, the property is to be paid and conveyed absolutely to the persons who may be found entitled to it by the first words of this clause, and it appears that the persons who, if they were living, were to be the recipients of the estate, were the two half-brothers of the testator; and then come the words 'to the heir or heirs male of their or either of their body,' but there are after these words no words of limitation or exclusion; therefore it appears to be pretty clear that the estate which was under any circumstances to be conveyed to the sons of the two half-brothers, was to be an absolute estate, because, as I said just now, there is no attempt to limit it in any way. This shews that the intention was that whenever this estate was conveyed from his own trustees to his half-brothers who might be alive, or to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them.

"Then the question arises what effect ought to be given to the words which follow the word 'body' in failure of which in trust to give the same to the son or sons of my said daughter, and whether if we attempt to give effect to them by giving effect to the view which we have formed of the general meaning of this devise, we shall contravene any rule of law.

"As I said before, the meaning of the first clause in our opinion is, that this estate is, upon the death of the daughter, to be given

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absolutely to these two half-brothers of the testator, subject to anything that comes after. It appears from the *Tagore Case*, as I said just now, that if that is a limited estate in the sense that it is an attempt to give anything to one, then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (1), and other cases besides, that although, according to Hindu law, it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. *Evans* and Mr. *Kennedy*, and may be taken as absolute law.

"Under these circumstances it seems to us that this will may be read as carrying out what we consider to be the true intention of the testator, which, as I have before said, we think was, that in the event of his two half-brothers having at the time of their death male descendants, that they if alive, or their families as representing them, if dead, should take the fee of this property, but that in the event of their having no male descendants at the time of their death the estate should be divested, and go over to the son or sons of his daughter, and that, we think, can be carried out on the law as laid down in this case of *Bhoobun Mohini Debi* without prejudice to any rule of Hindu law.

"Having come to that conclusion, we think that is the true construction of the will, and that is the proper and legal way of construing it. We are of opinion that the meaning of the will is the meaning we have given to it before, and for the reasons which we have given, with reference to the defeasance in this particular case, we see no reason why effect should not be given to it in that way.

"I ought to mention that it has been held, and it is not disputed, that a gift to the two Rajahs simply, without any words of limitation, is sufficient to create a gift of the entire estate, and that, consequently, it is possible to read this clause in the way

(1) Law Rep. 5 Ind. Ap. 138.

(89) 16R 4Cal 23
(94) 21Cal LR 339

I have suggested, without in any way deteriorating from the estate given to them, and if the words 'to the heir or heirs male of their or either of their body in failure of which in trust to give the same to the son or sons of my said daughter,' are to be read as a clause of defeasance only, and not as part of the clause which gives the estate, there is no difficulty about the matter, because, as I said before, the gift of the estate to the two Rajahs is sufficient, in itself, to convey the whole estate. For these reasons, we think that the effect of this will was to give the entire estate to the two half-brothers of the testator, subject to defeasance in the event of their dying without male issue. As I said just now, one of them is dead, the other is living. The one who is dead has alive male issue, and consequently his estate cannot now be defeated. The one who is living has male issue living, and although there is no reason for supposing that his estate will be defeated, it is impossible to foretell what the state of things will be when he is dead.

"Under these circumstances, we are of opinion that the Plaintiff has not established her right to absolute possession of one moiety of her father's estate, and that the only right she has, under her father's will, is the right which she is now in the enjoyment of, namely, the right to receive the rents and profits of that estate during her life, and that consequently her suit, so far as the claim for possession is concerned, must be dismissed.

Graham, Q.C., and *Doyne* (Sir *Horace Davey*, Q.C., with them), for the Appellant.

Rigby, Q.C., and *Mayne*, for the Respondents *Coomar Nilkrishna* and *Benoykrishna*, executors of the will and only sons of *Nreependro Krishna*, deceased.

Cowie, Q.C., and *Kennedy*, for the six sons of the Appellant.

Graham, Q.C., and *Cowie*, Q.C., contended that the clear intention of the testator was to impress upon his estate such a rule of devolution as was, according to the judgment in the *Tagore Case* (1), opposed to Hindu law and void. The intention,

(1) Law Rep. Ind. Ap. Sup. Vol. p. 47. 6 Moo. I. A. 377 (S. C. 1 Sath. 359

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for instance, was clearly expressed to exclude in every event females from the line of succession: see the expression "and to the heir of or heirs male of their or either of their body;" and also, "in failure of which to give the same to the son or sons of my daughter." By the construction of this will, adopted by the High Court, estates were conferred on the half-brothers which would descend contrary to the words of the will upon heirs of the said half-brothers other than the heirs male of their or either of their body. A gift of an estate tail must be cut down to the gift of a life estate, and not expanded to the gift of an absolute estate. No intention is manifested to give to the heirs male—they are used as words of limitation, otherwise "or" would have been used and not "and." Reference was made to *Tarakeswar Roy* v. *Shikhareswar* (1).

Rigby, Q.C., and *Mayne*, contended that the High Court was right in holding that the testator's half-brothers took an absolute estate defeasible on their dying without male issue living at their death. It is necessary to give full force and effect to the words "pay, assign, and convey," as shewing that the trustees were to make over the corpus of the estate absolutely. The words "heirs male, &c.," were not words of limitation. The testator only meant to give his estate to members of his own family. He is not describing heirs male of successive generations. *Shelley's Case* is not to be resorted to in construing a Hindu will. It is wrong to say that these are words of limitation and not of purchase, and then to say that the estate so arrived at is contrary to Hindu law and void. Reference was made to *Baker* v. *Tucker* (2). There is a vested estate in the brothers but defeasible, and on defeasance to go out of the usual line of succession. The scheme is not to create unusual estates, but to give life estates in remainder to the half-brothers with executory limitation over to persons who answer the designation of heirs of their body. The death of the brothers and not the death of the daughter is the *punctum temporis* at which the final disposition of the testator's estate is to be ascertained. The will should be remoulded, to

(1) Law Rep. 10 Ind. Ap. 51; S. C. Ind. L. R. 9 Calc. 952.
(2) 3 H. L. C. 106.

give effect to that scheme and intention. Reference was made to *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (1), and to *Tarakeswar Roy* v. *Shikhareswar* (2).

Graham, Q.C., replied.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The question in this case arises from a rather obscure passage in the will of *Rajah Jadubindro Kristna*, who disposed of the residue of his estate in the following terms:—

"I give devise and bequeath the residue of my real and personal estate both joint and self-acquired unto my executors, in trust to pay the rents issues profits and income thereof unto my said daughter during her lifetime, and after her death in trust to pay assign and convey the residue of my estate real and personal to my half-brothers *Rajas Nreependro Khrishna Bahadur* and *Norendro Krishna Bahadur* in equal moieties and to the heir or heirs male of their or either of their body, in failure of which in trust to give the same to the son or sons of my said daughter."

The will is dated the 25th of March, 1851. The testator died in 1852. His daughter, who was his only child, is the Plaintiff and Appellant in this suit. She has six sons, all born after the testator's death. His brothers both survived him. One of them, *Nreependro*, has died, leaving only two sons, both born after the testator's death. The other, *Norendro*, is living. He had three sons born in the lifetime of the testator, of whom one is dead and two are living, and four other sons born after the testator's death. The Defendants and Respondents in this suit are *Norendro*, the surviving brother; his six surviving sons, and the representative of the one who has died; the two sons of *Nreependro*, who are also his executors; and the six sons of the Plaintiff. Every person, therefore, who could possibly claim an interest under the residuary gift is a party to the suit.

The Plaintiff contends that the residuary gift is invalid, except

(1) Law Rep. 5 Ind. Ap. 138 (84 IR 4 Cal 23. (S) 2 Cal LR 339

(2) Law Rep. 10 Ind. Ap. 51; S. C. Ind. L. R. 9 Calc. 952 (61

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so far as it confers life interests on herself and her uncles, and that on the death of *Nreependro* the moiety of the estate designed for him or his heirs male became vested in her as her father's sole heir. The adverse contention is that the gift is made absolute to each of the testator's brothers, defeasible only in events which have not happened, viz., in each case, the death of the brother without leaving male heirs of his body then living. The High Court have adopted the latter view of the case, and have dismissed the suit. From their decree this appeal is brought.

The view of the High Court has been supported by the counsel for the Respondents, the brothers' families, who expressly stated that their argument, though endeavouring to amplify and illustrate the High Court's view, must be taken as not departing from it. The High Court considered that the true intention of the testator was, "that in the event of his two half-brothers having at the time of their death male descendants, they, if alive, or their families as representing them if dead, should take the fee of this property; but that in the event of their having no such descendants at the time of their death, the estate should be divested and go over to the son or sons of his daughter."

This conclusion is rested, first, on the direction to the trustees to "pay assign and convey," which, it is said, shews that the whole estate is to be dealt with; secondly, on the circumstance that no words of limitation or exclusion are attached to the expression "heir or heirs male of his or their body;" and, thirdly, on a view of the law which is stated thus:—

"It appears from the *Tagore Case* (1), as I said just now, that if that [the gift to the brothers] is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (2), and other cases besides, that although, according to Hindu law, it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty may

(1) Law Rep. Ind. Ap. Sup. Vol. p. 47. (2) Law Rep. 5 Ind. Ap. 138.

(84) 9 Cal. 377 (P.C.) 180 359 (84) 10 R 4 Cal 23 (84) 2 Cal LR 339

be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. *Evans* and Mr. *Kennedy*, and may be taken as absolute law."

The rules of law thus stated do not bear directly on the decision of the High Court, because in their view the will does not, as events have turned out, purport to confer any interest on an unborn person, or any gift over on contingency but it leaves gifts, made absolute in the first instance, undisturbed by subsequent events. But the whole construction of the will has been argued, quite properly, with reference to these rules. It is important to have them accurately stated. And their Lordships find that the statement of the High Court requires some qualifications.

The *Tagore Case* (1) decides not only that a devise to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid, which is more germane to the present case. There is no rule that the first recipient must take all the interest possessed by the testator, for limited interests are common enough. The rule is that if a Hindu donor wishes to confer an estate of inheritance, it must be such a one as is known to the Hindu law, which an English estate tail is not. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add; first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the *Mullick Case* (2); and secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in the *Tagore Case*.

The case of *Bhoobun Mohini* (3) conforms to all these rules. There was no gift over in that case. The donor made a gift to his sister, *Kasiswari*, in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well known, and often used by Hindu donors who intend to pass the whole inheritance, though they mention only children or issue. Then he said, "No other heir shall be entitled." This was held to mean that, if *Kasiswari*

(1) Law Rep. Ind. Ap. Sup. Vol. p. 47. (2) 9 Moore, Ind. Ap. Ca. 123.
(3) Law Rep. 5 Ind. Ap. 138.

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died leaving no issue then living, her interest was to cease. In effect, the construction was that, if *Kasiswari* left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent he or his heir would lawfully re-enter.

Upon the construction of this will their Lordships are unable to find anything which points to the death of the brothers as the time for ascertaining in what way the property is to be disposed of. The life of the daughter is the period for which the trust continues; it is on her death that the trustees are to pay, assign and convey; and the question is, to whom? The payment, &c. is contemplated as a single act to be performed at one moment of time, and that time is the death of the daughter. The expression "pay assign and convey," is important to shew as much as that, but their Lordships do not enter upon any discussion, such as has taken place in *England*, as to the effect of such words upon the nature of the gift over. They treat the will in the same way as if the testator had said that, on his daughter's death, the property was to be held in trust for, or that it should go over to, his brothers and the other donees.

To whom then is the conveyance to be made? None is directed except to the brothers in equal moieties and to the heir or heirs male of their or either of their bodies (or, in simpler words, to the brothers and their heirs male respectively in equal shares), on failure of which to the sons of the daughter. Their Lordships cannot see where the absolute gift of the property to the brothers comes in. It is given, not to them, but to them and their heirs male. Why should the words "heirs male" be introduced at all, if an estate descendible to heirs general has previously been given? The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator.

The latter of these two alternatives can only be reached by reading the word "and" as if it was "or." Indeed one passage of the judgment looks as if this construction was in the minds of

the learned Judges. They point out that no words of limitation are attached to the words "heirs, &c." And they add, "This shews that the intention was that whenever the estate was conveyed from his own trustees to his half-brothers who might be alive, *or* to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them." This cannot refer merely to the circumstance that in making the conveyance after the daughter's death it might be necessary, if the brothers themselves were dead, to convey to their heirs, because, on the hypothesis of an absolute interest in the brothers, the conveyance would be to the heirs general, or it might be to the alienees, not to the male descendants.

The absence of words of limitation after the words "heirs, &c.," does not appear to their Lordships to be of much significance; but, as far as it goes, it rather favours the Appellant's than the Respondents' construction, because if "heirs, &c." are themselves words of limitation, words of limitation attached to them would be inappropriate; otherwise they would be appropriate, and they would tend to shew that the "heirs" were objects of direct gift.

But upon putting it to Mr. *Rigby* whether he claimed to read the word "and" in a disjunctive sense, he at once disclaimed any such contention; and indeed it is obvious that there are great difficulties in the way of such a construction, even if it would better the position of the Respondents.

Their Lordships therefore find that the first of the two alternative constructions is the only possible one. The will is composed in English; the draftsman seems to have had a smattering of English real property law; he clearly knew there was a difference between a son and an heir male of the body; and apparently he had English dispositions of property in his eye. This seems to be an attempt, of a kind not infrequent among *Bengal* zemindars of late years, to introduce English estates tail into Hindu property, which the law will not allow. At all events their Lordships must construe the words in their plain and obvious sense; and finding no gift to the brothers, except that which orders a conveyance to them and the heirs male of their bodies, they hold that the intention was to confer on them an estate of inheritance resembling an English estate in tail male.

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That cannot take effect. But the testator intended to benefit his brothers personally; and his gift to them and their heirs male would if valid have carried with it the enjoyment by each of his share during his life. They think that this intention, though it is mixed up with the intention to give an estate tail, may lawfully take effect, as was held in the case of *Tarakeswar Roy* (1).

Whether the words which introduce the gift over, "in failure of which" import a general failure of the brothers' issue, is a point on which we need not speculate. It is possible that the draftsman, following English models, intended to give a remainder after an estate tail; it is also possible that he was only thinking of the contingency that at the daughter's death, when the trustees came to convey, they might find neither brothers nor issue of brothers in existence. In the first case the gift fails with the estate tail after which it is limited; and in either case the gift fails because the daughter's sons, being unborn at the testator's death, are incapable of taking anything from him.

It is suggested that a Court of construction may hold, in favour of the intention, that a fee simple or absolute interest is conferred by inapt words or dispositions, just as in English law an estate tail is often held to be conferred by inapt words or dispositions, because it comes nearest to effecting the actual intention of the testator. But if this testator intended not to give an absolute interest, which their Lordships hold to be clear from his introduction of heirs male, it is impossible to say that his intention is more defeated by the law which cuts down his gift in tail to a life interest, than it would be by straining the will to give an absolute interest, in which case the property might pass away from the family to a mortgagee, or a general creditor, or a strange donee. Their Lordships would not be justified in taking any such liberty with the will.

The Plaintiff prays for a declaration of rights, for possession of a moiety of the property, for a partition, and for the appointment of a trustee. The decree, after declaring the rights, gives directions as to the appointment of a trustee and the continuance of a receiver. Except as aforesaid it dismisses the suit. Their Lord-

(1) Law Rep. 10 Ind. Ap. 51.

ships are of opinion that the decree should be discharged so far as it declares the rights of the parties, and so far as it dismisses the suit. Instead of the portion discharged there should be declarations that, according to the true construction of the will, the gift of the residue, so far as it purports to confer an estate of inheritance on the testator's half-brothers and the heirs male of their bodies, is contrary to law and is void; that in the events which have happened the gift to the sons of the Plaintiff, the testator's daughter, is incapable of taking effect; that each of the testator's half-brothers took an estate for his life in one moiety of the residue in remainder expectant on the death of the Plaintiff; and that, on the death of *Rajah Nreependro Krishna Bahadoor*, the inheritance of his moiety devolved on the Plaintiff as her father's heir in remainder immediately expectant on her own life estate under the will, and she therefore became entitled in possession to one moiety of the residue. The High Court should place her in possession of that moiety, and should take steps to effect a partition if either of the parties desires it.

As regards costs, the High Court thought it just that the several parties should bear their own. Their Lordships think that the rights of all parties under this perplexing will could not have been settled, as by this decree they will be, without bringing before the Court all parties for whom the will expressly designed gifts, or who by a reasonable construction could claim them. The suit, or some like suit, was absolutely necessary, and it is not too extensively framed. The case is one in which it is just to pay the costs of all parties out of the residue in dispute. The decree therefore should be varied on this point also. In all other respects it should be affirmed. Their Lordships will deal in the same way with the costs of this appeal.

They will humbly advise Her Majesty in accordance with this opinion.

Solicitors for appellant: *Watkins & Lattey.*

Solicitors for Respondents *Coomars Nilkrishna* and *Benoy Krishna: Lawford, Waterhouse & Lawford.*

J. C.* 1888 Nov. 15; Dec. 1.

NANDI SINGH AND ANOTHER . . . . . PLAINTIFFS;

AND

SITA RAM AND ANOTHER . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Evidence of Local Custom—Hindu Widow's Power of Alienation under Local Custom.

Held, that upon the evidence a local custom was established whereby a sharer in Hindu family property or his wife could in the absence of male issue give his share to his daughter or daughter's son, and thereby defeat the preferential right of his brothers' sons.

Held, that a gift by the widow of her husband's share as authorized by the custom was an absolute gift and not merely of her widow's estate.

Where such gift was to her daughter and daughter's husband jointly, *held*, that the gift was invalid as regards the latter, but that the daughter took the whole.

Humphrey v. *Tayleur* (Amb. 138) held to be applicable.

APPEAL from a decree of the Judicial Commissioner (July 7, 1885), affirming a decree of the District Judge of *Lucknow* (June 10, 1884), which varied a decree of the Subordinate Judge of *Unao* (December 24, 1883).

The Plaintiffs sued to recover certain property which had formerly belonged to one *Sheo Bahksh*, their uncle, and which had been successively held by his widow and daughter. At the death of the daughter, mutation of names had been granted to the first Defendant, *Sita Ram*, husband of the daughter. The first Court found in favour of the Plaintiffs for half the amount they claimed. The District Judge wholly dismissed the suit, and this dismissal was confirmed on appeal by the Judicial Commissioner of *Oudh*.

The facts are stated in the judgment of their Lordships.

The Judicial Commissioner's judgment was as follows:—

"It is further contended that under the terms of the wajibularz, the widow could not create any interest beyond her own lifetime.

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, SIR RICHARD COUCH, and MR. STEPHEN WOULFE FLANAGAN.

This, no doubt, is the ordinary Hindu law, but it is clear that this is not the intent of the wajibularz, which, I consider, has been rightly interpreted by the Courts below as giving the widow power to create an absolute estate in favour of the daughter or daughter's son of the original owner.

"I further concur with the District Judge, that the deed of gift, though invalid as regards *Sita Ram*, was a valid conveyance of the whole share in favour of his wife, *Musammat Mithana Kunwar*, the daughter of *Sheo Bakhsh*. I therefore affirm the decree of the Lower Appellate Court, and I dismiss the appeal with costs."

Mayne, and *J. H. Arathoon*, for the Appellant, contended that the Courts below were wrong in holding that under the wajibularz and deed of gift an absolute estate descendible to her own heirs was or could be created in favour of *Mithana*. Further, the deed of gift was admittedly invalid as regards the second donee, the husband, the custom not authorizing the same. It was therefore invalid as regards both. The effect of the deed, according to the intention of the donor, was to create a joint estate for the lives of both donees with survivorship to the longest liver. This survivorship was invalid, and therefore the estate as granted came to an end on the death of *Mithana*. Both the Appellate Courts have treated the gift as conferring upon *Mithana* an estate different from that which they regard as intended by the donor. Such an effect ought not to be given to it. Reference was made to *Harvey* v. *Stracey* (1), *In re Farncombe's Trusts* (2), and *In re Brown's Trust* (3). As regards the validity and effect of the wajibularz, see Act XVII. of 1876, ss. 16 & 17, and *Uman Parshad* v. *Gandharp Singh* (4).

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Appellants in this case are the grandsons of one *Fatteh Singh*, who had two sons, *Sardar Singh*, the father of the Appel-

(1) 1 Drew. 117.
(2) 9 Ch. D. 652.
(3) Law Rep. 1 Eq. 74.
(4) Law Rep. 14 Ind. Ap. 134. (7)

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lants, and *Sheo Bakhsh*. The latter married *Bichan Kunwar*, and died on the 20th of April, 1869, without leaving any male child. They had a daughter, *Mithana Kunwar*, who was married to *Sita Ram*, the first Respondent. *Mithana Kunwar* died on the 18th of March, 1878, leaving a daughter, *Mussammat Maharaja*, the second Respondent. *Bichan Kunwar* died on the 26th of March, 1874. The suit was brought on the 28th of September, 1883, by the Appellants, to recover possession of land in the village *Babu Rajmau*, pargana *Harha*, district *Unao*, which was the share of *Sheo Bakhsh* in the property inherited by him and his brother, the Plaintiffs claiming to be his heirs according to Hindu law, and entitled to succeed to his estate on the death of his widow. It was not disputed that the Plaintiffs would be entitled if the ordinary law was applicable. The defence was rested upon a custom of the village of *Babu Rajmau* as to the right of inheritance, and a deed of gift dated the 7th of March, 1870, executed by *Bichan Kunwar*.

The wajibularz which governs the right of succession to the property in dispute is as follows:—

"Extract from wajibularz of village *Babu Rajmau*, pargana *Harha*, par. 4, of right to inheritance.

"The rule of inheritance is that if a sharer has children by two lawfully married wives—that is, one child by one wife and several by the other—the children by both the wives shall get equal shares, that is, one child will get possession over one half, and several children over the other half. If one wife have children, and the other be childless, both of them will hold possession of equal shares for their lifetime; after the death of the childless wife, the children of the other wife will hold possession in equal shares. If there be no male child, and any sharer or his wife make a gift of his or her share during his or her lifetime to his or her daughter or daughter's son, and puts her or him in possession of the same, they will remain in possession. If there remain no descendants of any sharer's son or daughter, his brothers or nephews descended from the same ancestor shall take possession of the share. A non-married wife, or children by her, shall not get anything except maintenance."

The intention appears to be to modify the Mitakshara law

which prevails in *Oudh* by enabling a shafer in family property or his wife to alter the course of succession by introducing a a daughter or daughter's son, and their descendants male or female, in preference to brothers or nephews of the sharer. There is no reason for limiting the meaning of "descendants" to children, as where they are intended that word is used, and where a male is intended it is so said. It is also apparent from the provision that the brothers and nephews are to take if there remain no descendants of a son or daughter, that the gift by the wife must be of more than the interest she would take as a widow, and is not, as the Appellants contended, limited to that interest. Both the Lower Courts have understood descendants as meaning male and female in any degree.

On the 7th of March, 1870, *Bichan Kunwar* executed a deed of gift of the property in dispute to *Musammat Mithana* and *Sita Ram*, the words of gift being followed by "I promise and agree in writing that the donee may, from the date of execution of this instrument, take proprietary possession similar to mine over the gifted property. There has been left no claim right dispute to me or any of my heirs." This was intended to be and should be construed as an absolute gift. The contention of the Appellants in the Lower Courts and before their Lordships was that the gift, being invalid as regards *Sita Ram*, was also invalid as regards *Mithana*. The District Judge and the Judicial Commissioner have both held that it is a valid gift of the whole to *Musammat Mithana*. Their Lordships are of this opinion. The gift is to the two donees jointly, and in *Humphrey* v. *Tayleur* (1) Lord Chancellor *Hardwicke* said, "If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole." This principle does not depend upon any peculiarity in English law, and is applicable to this deed of gift.

The question whether the gift was accompanied by possession was disposed of by their Lordships in the course of the argument, and it is not necessary to say more upon it.

Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss the appeal.

Solicitors for the Appellants: *Young, Jackson, & Beard.*

(1) Amb. 138.

Reported also LR 12 Mad 241

J. C.* 1888 Nov. 24, 29; Dec. 12.

SIVARAMAN CHETTI AND OTHERS . . . PLAINTIFFS;

AND

MUTHIA CHETTI AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Evidence—Exclusive Right to repair a Tank—Right to exclude co-Sharers from Contribution.

Case in which the Plaintiffs claimed to be entitled to repair a tank at their own expense, to the exclusion of the rest of the village, and in which their Lordships *held* on the evidence that the tank was the common property of the village, and that no class of the villagers had any right to exclude the rest from contributing to the repairs.

* ILR 6 Mad 229

APPEAL from a decree of the High Court (Dec. 4, 1882), reversing a decree of the Subordinate Judge of *Madura* (April 7, 1880).

The facts of the case are stated in the judgment of their Lordships.

Graham, Q.C., and *Mayne*, for the Appellants, contended that the evidence established a grant by the State or the villagers of land as a site for the tank, that *Meyappa Chetti* founded the tank in the manner contemplated by the grant, and that the Appellants were his heirs. The tank had always been used for the benefit of the village community. It was a charitable institution governed by the laws appropriate to such cases; and *primâ facie* the management, supervision, and exclusive duty of providing and executing necessary repairs devolved upon the heirs of the founder. The evidence of usage supported this claim. Reference was made to *Churton* v. *Frewen* (1) and *The Duke of Norfolk* v. *Arbuthnot* (2).

Cowie, Q.C., and *Doyne*, for the respondents, were not heard.

* *Present*:—LORD HOBHOUSE, SIR RICHARD COUCH, and MR. STEPHEN WOULFE FLANAGAN.

(1) Law Rep. 2 Eq. 634.

(2) 4 C. P. D. 290; 5 C. P. D. 390.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Plaintiffs and Defendants are all inhabitants of the village of *Karakkudi*, and the subject of dispute is a tank belonging to that village. The Plaintiffs claimed in their plaint to be hereditary hukdars, which the High Court interpret to mean rightful owners, of the tank, and they prayed for a declaration that they have the sole right to repair it at their own exclusive cost, and for other relief flowing from that right and from the Defendants' interference with it. The Subordinate Judge gave the Plaintiffs a decree establishing their sole right to repair the tank at their own exclusive cost. Upon appeal the High Court dismissed the suit. Their Lordships are now asked to say the High Court was wrong.

The Plaintiffs do not now assert that they are owners of the tank in any full or proper sense of the word; they admit that the villagers at large have full right to the enjoyment of it; but they contend that the function of cleaning, repairing, and generally managing and protecting the tank is an hereditary possession of their family, which they have a right to retain so long as they bear the cost of it. It may be that for generosity and public spirit their attitude deserves all that has been said of it by their counsel. But the Defendants object to it; and the only question for a Court of Justice is on which side the lawful right is to be found.

Though the various classes and divisions of villagers are called by local and unexplained names, this much is clear; that the tank in dispute is on the site of an old village tank; that about the beginning of the century it was improved at the cost of the Plaintiffs' family upon the request of at least some leading villagers, and with the general acquiescence of the village; that since the year 1842, when there was a quarrel and a settlement, the Plaintiffs' family have executed the general repairs and cleansing, and have on one occasion interfered to protect the tank from encroachment; and that some of the Defendants have constructed and kept in repair flights of steps leading down into it. These matters, to which the greater part of the

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oral evidence relates, are not conclusive either way. But the proceedings of 1842 are of great importance and require to be carefully looked at, not because they resulted in any decree or contract binding the present parties, but because they furnish the best evidence of the true relations and legal position of the disputants.

On the 1st of April, 1842, *Chidambaram*, who was the head of, or in some way represented, the Plaintiffs' family, presented a petition to the Collector of *Madura*, in which he alleged that when his predecessor improved the tank, it was agreed that his family should have charge of all the affairs appertaining thereto, and maintain it for ever. Then, after stating that their opponents in the village had prevented them from cleansing the tank, he prayed, "That an order may be passed allowing us to remove the mire and maintain the said uruni charity for ever as we have been usually doing, prohibiting interference on the part of the persons who are endeavouring wrongfully to trouble us, and enabling the continuance of the charity in perpetuity."

The Collector referred the matter to the local Ameen, who took evidence and made a report; and on the 9th of May, 1842, the Collector declared that the opponents were not justified in interfering, and gave directions to the Ameen to issue orders for the complainants to carry on the work according to custom. It is noticeable that neither in the evidence adduced to the Ameen, nor in his report, nor in the judgment of the Collector, does there appear anything to support *Chidambaram's* allegation of an agreement that his family should have charge of all the affairs of the tank and maintain it for ever.

The order of May, 1842, was no sooner issued than the opposite party, represented by one *Lakshmanan Chettiar*, began to petition against it. They insisted that the tank was a common charity, and denied both the right of the Plaintiffs' family to maintain it solely and the fact that they had done so. And they prayed a direction "that the charity which has, according to custom, been maintained by our Nagarattar community in common shall continue to be maintained in common henceforth." The immediate result of this petition was that the Collector directed that action on his previous order should be suspended

till he himself came to the spot. The ulterior result was a compromise of the dispute, which for the time put an end to it.

The kararnamah which embodies the compromise is the most important document in the case. It was entered into before the Collector himself very formally. It was prepared by the head sheristadar of the district. It was signed by *Chidambaram* and *Lakshmanan* the principal disputants, and by two others, apparently a partisan of each side. And it was attested by the signatures of the Collector and the Assistant Collector. It runs as follows:—

"On *Chidambaram Chettiar* commencing repairs to the kalkattu amman uruni, *Lakshmanan Chettiar* and others said that they also would give money for digging that uruni. *Chidambaram Chetti* objected that it ought not to be so received; and both parties resorted to the authorities. *Chidambaram Chettiar* contended that, as (his) father originally built the kalkattu uruni, he was the owner. The authorities (said) that urunis dug for charitable purposes are common property; and *Chidambaram Chettiar* urged that other urunis in the village should be likewise common, which statement the authorities accepted as just; and *Lakshmanan Chettiar* and others, also admitted it as right. Therefore, both the parties having agreed that all the tanks and urunis of the Nagarattars of *Karakkudi* are common property, we have, with our mutual consent, agreed in the presence of the authorities, that in future, on occasions of removing mud from the uruni and doing other repairs, all the Nagarattars should collect the money in common, hand over the said money to the person who may be in management as the original proprietor of the uruni, have the work done and adjust the accounts in common, and that there shall be no dispute whatever about this in future. Therefore we have executed this to be held as a deed of kararnamah for the same. We will henceforward abide by this alone."

The inferences to be drawn from this document are clear enough. The tank is the property not of *Chidambaram*, but of the villagers, and the repairs are to be effected by common collections through the person in management, who is to account for his receipts and expenses. The only obscurity is in speaking

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of the person in management as the original proprietor of the uruni." Whatever may be the meaning of that expression, it cannot detract from the clear statement that all the tanks and urunis are common property. The terms of the kararnamah are fatal to the claim of the Plaintiffs that they are entitled to repair at their sole expense. Their Lordships do not find anything in the previous evidence to shew that these terms are erroneous; nor anything in the subsequent evidence to shew that the position of the parties has been altered. The circumstances that the Plaintiffs' family have in fact executed subsequent repairs without dispute, and that they have stood forward to protect the tank when threatened with injury, are quite insufficient for that purpose.

Moreover, it is very difficult to understand how such a right as this can be claimed without a corresponding obligation; and the Plaintiffs' counsel are unable to shew in what way any obligation is imposed on their family. There is no endowment to support the tank, and no right of taking tolls or fees. It is confessedly at the option of the Plaintiffs' family whether they will execute the repairs or not. In their Lordships' opinion, it is equally at the option of the other villagers to permit the repair to be executed by the Plaintiffs, or to insist on the work being done at the common cost.

It seems a great pity that there should be litigation on such a ground. Disputes for the purpose of avoiding a charge are much more common than disputes for the purpose of bearing one. But, as we have a dispute of the latter kind, it must be settled like any other, by law. And that compels their Lordships to hold that the tank remains the common possession of the village, and that no class of the villagers has any right to exclude the rest from contributing to the repair. The appeal fails, and must be dismissed with costs. Their Lordships will humbly advise Her Majesty to this effect.

Solicitors for Appellants: *Lawford, Waterhouse & Lawford.*
Solicitors for Respondents: *Frank Richardson & Sadler.*

Reported also ILR 16 Cal 556 (n)

BHAIYA RABIDAT SINGH . . . . . PLAINTIFF;

AND

MAHARANI INDAR KUNWAR AND OTHERS RESPONDENTS.

J. C.*
1888
Nov. 9, 14;
Dec. 1.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Oude Estates Act of 1869, *s.* 13, *sub-s.* 1—"*Intestate*"—*Written Authority to adopt need not be registered—Law of Adoption—Effect of Agreement between Adoptive Mother and Natural Father.*

Act I. of 1869 requires an authority to adopt to be in writing, but does not require such writing to be registered, and Act III. of 1877, sect. 17, excepts from registration authorities to adopt which are conferred by will.

"Intestate" in sub-sect. 1, sect. 13, means intestate as to estate. An adopted son is a person who would have succeeded to an intestate within the meaning of that section, although the authority to adopt him was conferred by the will of such intestate.

An adoption otherwise valid is not prejudiced by an agreement between the adoptive mother and natural father that the former should retain her husband's estate during her life. Such an agreement does not affect the rights of the son or render his adoption conditional.

Cited
ILR 14 Cal 549

Referred to
ILR 14 Cal 556
— 16 Mad 402

APPEAL from a decree of the Judicial Commissioner (March 27, 1886), affirming a decree of the District Judge of *Fyzabad* (May 19, 1885), which dismissed the Appellant's suit.

That suit was brought to declare the Appellant's title as the next reversioner in respect of the whole estate of the deceased Maharajah of *Bulrampur*, and also that the adoption of the second Respondent by the first Respondent, *i.e.*, the Maharajah's senior widow, be declared invalid. The junior widow of the Maharajah was made a Defendant to the suit.

The facts of the case are stated in the judgment of their Lordships. The will of the Maharajah was construed in a former suit, to which however the Appellant was not a party; see *Maharani Indar Kunwar* v. *Maharani Jaipal Kunwar* (1).

The material part of the judgment of the District Judge was

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR RICHARD COUCH, and MR. STEPHEN WOULFE FLANAGAN.

(1) Law Rep. 15 Ind. Ap. 127.

Ref/ ILR 15 Cal 725

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BHAIYA RADIBAT SINGH v. MAHARANI INDAR KUNWAR.

in reference to the 5th issue, viz., as to the validity of the adoption. He said:—

"For the Plaintiff it is contended that an authority to adopt a son, executed after a particular date, and not conferred by a will, must be registered: sect. 17, Act III., 1877.

"The Plaintiff's counsel admits that the document of the 15th of March, 1878, is a will so far as the Maharani Defendant 1 is concerned, because she is one of those persons contemplated in sect. 22, Act I., 1869, in whose favour the talukdar might bequeath his estate by a will unregistered under the provisions of sect. 13, clause 1, of the same Act; but the learned counsel contends that so far as Defendant 2 is concerned the power of adoption is invalid for want of registration; that as Defendant No. 2 would not come in under sect. 13, clause 1, the document of the 15th of March, 1878, must have been registered within one month of its execution before it could be declared a will.

"The Plaintiff's counsel further draws attention to clause 5 of sect. 22, and argues that it is unreasonable to suppose that when the talukdar himself adopts a son his deed must be registered, and yet when he confers the power of adoption on his widow his deed need not be registered.

It is also urged that when a widow adopts a son she divests herself of her estate. Whereas here we find the Maharani still enjoying the estate, and the Court of Wards not interfering on behalf of the minor to protect his interests.

"As I adopt the view of law as urged for the Defendants by Mr. *Jackson* and *Munshi Kali Parshad*, I proceed to record my finding.

"It seems to me that sect. 13 refers only to those immediately succeeding the testator. In the present case the first Defendant, as the senior Maharani or widow of the deceased, is the person in whose favour the will need not be a registered one.

"As to clause 8, sect. 22, its provisions have been strictly complied with, for the second Defendant is to succeed the widow upon her death, because the adoption has been made with the consent in writing of the Maharani *Indar Kunwar's* deceased husband, and the deed of adoption has been registered.

"The provisions of clause 8 have in fact been literally followed.

"The document of the 15th of March, 1878, appears to me to be a complete will, and therefore registration of the power to adopt was unnecessary; and as to sect. 17, Act III. of 1877, I consider that it does not repeal even impliedly a peculiar Act especially enacted for the benefit of a certain class of persons; and that clause 8, sect. 22, stands in its entirety, unless it has been distinctly repealed in whole or in part.

"If the late Maharajah had bequeathed his estate first to the senior Maharani and afterwards to the second Defendant, the will must have been registered to enable the second Defendant to succeed, because he is not one of those persons contemplated by sect. 22, who could succeed under an unregistered will. The second Defendant will take the estate under the specific provisions of a particular clause (No. 8), for which no registration is prescribed beyond the registration of the deed of adoption.

"The adoption of the second Defendant is found to be valid."

J. H. Arathoon, for the Appellant, contended that the Appellant was entitled to succeed to the estates of the Maharajah after the death of the Maharani. The adoption of the second Respondent *Udit Narain* was void. The authority to adopt contained in the will was invalid, the ordinary Hindu law upon the subject having been superseded by Act I. of 1869. Moreover, it was not registered, and was, therefore, invalid under Act VIII. of 1871. If the adoption were valid, the adopted son had no title under the intestate clause of Act I. of 1869: see sect. 22, sub-sect. 8. No consent in writing under that sub-section was given by the Maharajah to his adoptive widow. The adoption was vitiated by the agreement of the 26th of October, 1883, between the adoptive mother and the natural father of the adopted child, which was in itself sufficient to render the adoption fraudulent and void. Reference was made to *Ramasawmi Aiyan* v. *Vencataramaiyan* (1); *Mayne's* Hindu Law (4th ed., sect. 103): *Rajah Nilmoni Singh* v. *Bakranath Singh* (2); *Rajah Vellanki Venkata* v. *Venkata Rama Lakshmi Narraya* (3); *Mahashoya Shoshinath Ghose* v. *Srimati Krishna Soondari Dasi* (4); *Duke of Portland* v. *Topham* (5).

(1) Law Rep. 6 Ind. Ap. 196.
(2) Law Rep. 9 Ind. Ap. 104.
(3) Law Rep. 4 Ind. Ap.
(4) Law Rep. 7 Ind. Ap.
(5) 11 H. L. C. 32.

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Sir *Horace Davey*, Q.C., *Doyne*, and *C. W. Arathoon*, for the Respondents, the senior Maharani and the adopted son, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

It appears to their Lordships that this case is free from difficulty.

The will of the late Maharajah of *Bulrampur*, Sir *Digbijai Singh*, was recently under the consideration of this Board on the occasion of a claim by his junior widow to joint proprietary rights in his estate. Their Lordships then expressed their opinion that, according to the true construction of the will, the Maharajah conferred upon his senior widow (who is the first Defendant in the present suit), and upon her alone, a life estate in all his property, and authority to select and adopt such minor male child of his family as she might think fit. The adoption which she was not only authorized but required to make was to be "according to the custom of the family and according to the Hindu law," and the adopted son was to "be in place of an actual son the owner of the entire riasat, and the assets moveable and immoveable," the widow taking a provision for her maintenance.

The senior widow selected for adoption a minor male child of the Maharajah's family. It has been admitted in this suit that "the ceremonies of adoption were duly performed." They took place on the 8th of November, 1883. On the 5th of December following the senior widow executed a deed of adoption, which was duly registered, by which she declared that, in accordance with the written permission of her deceased husband, she had adopted *Udit Narian Singh* (who is the second Defendant to this suit), and that he would be the proprietor of the Maharajah's estate and property both moveable and immoveable like a real son.

The Appellant, who is a distant relative of the late Maharajah, and the person upon whom, according to the rules of intestate succession prescribed by the *Oudh Estates Act*, 1869, in default of any widow of the Maharajah, or any son adopted by her,

provided by the Act, or any male lineal descendant of such son, the Maharajah's talukdari estate would descend, brought this suit for the purpose of having it declared that the adoption of the second Defendant was invalid, fraudulent, and void.

Three grounds of objection to the validity of the adoption were urged before their Lordships.

In the first place it was contended that the adoption was invalid, because the authority to adopt was not contained in a registered document. Their Lordships are of opinion that there is no ground for this contention. The Act of 1869 requires the writing by which an authority to adopt a son is exercised to be registered. It also requires the authority to be in writing. But it does not require that writing to be registered. Act III. of 1877, sect. 17, which does require authorities to adopt a son to be registered, expressly excepts authorities conferred by will.

In the next place it was contended that the adoption was invalid, and the bequest to the adopted son of no effect, so far, at any rate, as regards the talukdari property, because the adopted son was not a person who could take the talukdari property under an unregistered will. It is obvious that this objection, assuming it to be well founded, would not better the position of the Appellant if the senior widow had authority in writing to make the adoption, and did in fact make the adoption in manner prescribed by the Act of 1869. The adopted son would not take until the widow's death, but still he would take to the exclusion of the Appellant. Their Lordships, however, are of opinion that the objection is not well founded. In order to make the objection good the Appellant has to establish the proposition that the adopted son is not within the exception contained in sect. 13, sub-sect. 1, of the Act, that he is not a person who, under the provisions of the Act or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to the talukdari estate or to an interest therein if the Maharajah "had died intestate." The Appellant endeavoured to support that proposition by arguing that if the Maharajah had left no will there would have been no authority to adopt in existence. And then, in regard to succession to the estate, *Udit Narain Singh* would have ranked as the son of *Guman*

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Singh. But the word "intestate" in sub-sect. 1 evidently means intestate as to his estate, that is, his estate as that expression is defined by the Act, the taluk or immoveable property to which alone the Act is declared to extend. This is plain on consideration of sect. 13 taken by itself, but it is made still plainer, if possible, by reference to sect. 22, which is closely connected with sect. 13, and which expresses what otherwise would necessarily be implied, and qualifies the word "intestate" by the addition of the words "as to his estate."

The last point urged on behalf of the Appellant was described by the learned counsel in support of the appeal as his strongest point. It was this. The senior widow seems to have been unwilling to disregard her husband's injunctions, but at the same time she was anxious to keep the estate during her life. She obtained from the natural father of the child whom she proposed to adopt a document dated the 26th of October, 1883, in which it was declared that she should have full control during her lifetime over the property left by the late Maharajah. It was not suggested that there was or could have been in the ceremonial of adoption any such condition or reservation, nor is any trace of that condition or reservation to be found in the deed of adoption of the 5th of December, 1883. But some months afterwards, on the 28th of March, 1884, the senior widow executed what is called a second deed of adoption, by which she purported to revoke the deed of the 5th of December, on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death.

On these facts it was argued that the adoption was a fraud upon the authority to adopt, and therefore void.

This point seems to their Lordships equally untenable.

The conduct of the senior widow is not altogether to be commended, but it would be extravagant to describe it as fraudulent, or to maintain that the adoption was made for a corrupt purpose or for a purpose foreign to the real object for which the authority to adopt was conferred. It may be true, as suggested by Mr. *Arathoon*, that the child of *Guman Singh* was selected in preference to the child of the Appellant because the senior widow had reason to believe that the selection would be less likely to

lead to her position being challenged. But it is difficult to understand how a declaration by *Guman Singh* or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined. The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection. The second deed is admittedly inoperative. No conditions, therefore, were attached to the adoption. Had it been otherwise, the analogy, such as it is, presented by the doctrines of Courts of Equity in this country relating to the execution of powers of appointment to which Mr. *Arathoon* appealed would rather suggest that, even in that case, the adoption would have been valid and the conditions void.

There Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The Appellant will pay the costs of the appeal.

Solicitors for Appellant: *Young, Jackson, & Beard.*

Solicitors for *Maharani Indar Kunwar* and *Udit Narain Singh: T. L. Wilson & Co.*

Reported also ILR 16 Cal 564

J. C.* 1888 Nov. 7, 9; Dec. 1.

BHUGWANDASS . . . . . PLAINTIFF;

AND

THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE RECORDER AT RANGOON.

Marine Insurance—"Open Cover"—Refusal of Policies in Terms of Cover—Specific Performance.

An open cover, or proposal to insure before the goods to be insured are shipped, was given by the Respondents to *M.* in order that he might give it to the charterer, who after shipment applied for policies to the amount mentioned in the cover and was refused:—

Held, that such application constituted an acceptance of a subsisting proposal, and that there was a binding contract with the charterer to issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient as there was a refusal to give any.

APPEAL from a decree of the Court of the Recorder (July 23, 1886), dismissing the Appellant's suit for the specific performance of a contract made by the Respondent company to deliver a policy of insurance not exceeding Rs.15,000 on rice and disbursements for and on the *Copeland Isle* on a voyage from *Rangoon* to *Bombay*.

The facts are stated in the judgment of their Lordships.

The plaint alleged that on the 9th of March, 1885, at *Rangoon*, the Appellant entered into an agreement with one *James Macrory* for a charter of the latter's vessel, *Copeland Isle*, from *Rangoon* to *Bombay*, and that *Macrory* guaranteed the vessel a good insurance risk, and undertook to obtain insurance for such goods as the Appellant should ship by her. That the Appellant, intending to ship 1000 bags of rice on board of her, required *Macrory* to obtain insurance for the sum of Rs.15,000 upon the rice and the disbursements which the Appellant was to make on account of the vessel. That *Macrory* applied to the agents of the Respon-

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

dents at *Rangoon* to accept an insurance risk to the extent of Rs.15,000 by the *Copeland Isle* to *Bombay*, which they agreed to do, and in due course issued an "open cover" for the same. That *Macrory* brought and made over to the Appellant the "open cover," and at the same time indorsed it over to the Appellant, in accordance with the custom prevalent in *Rangoon*, and thereafter the Appellant executed a charterparty for the said vessel. That the Appellant shipped 1000 bags of rice on the *Copeland Isle*, and disbursed on her the sum of Rs.4000, and on the 31st of March, 1885, wrote to the Respondents' agents a letter requesting them to declare policies of insurance on 1000 bags of rice, value Rs. 10,000, and the disbursement of the vessel from *Rangoon* to *Bombay*, Rs.5000, and inclosed the premium. That the Respondents on the 1st of April, 1885, replied by letter regretting that as they did not grant the Appellant an "open cover" they could not issue a policy, and returning the premium. That the Respondents persistently refused to issue the policy, and that the *Copeland Isle* whilst proceeding on her voyage to *Bombay* was totally lost. The Appellant claimed specific performance of the said contract of insurance with costs.

The substance of the Respondents' defence was as follows:—

(*a.*) That the document sued on (which the Respondents alleged was for convenience made out in an open cover form), was at the request of the said *J. Macrory* given to him by the Respondent company as an intimation in writing of its willingness to insure rice which might be shipped in the said vessel, and to enable other insurance offices to know that the company considered such vessel a fair risk, and that for this reason it was not signed by the company's agents or registered in its books as it would have been had it been issued by them in due course and as a preliminary to granting a policy of insurance; and moreover that such document did not cover disbursements.

(*b.*) That the Plaintiff was, before the sailing of the vessel, and in the presence of the said *J. Macrory*, informed by the company's agents of the circumstances under which the document sued on was given, and *Macrory* did not dispute what was then stated.

(*c.*) That the company on the 25th of March, 1885, granted to

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Annamallay Chetty a policy of insurance for Rs. 17,500 on rice shipped by him in the same vessel, thus taking a larger risk than the amount named to *Macrory*.

(*d.*) That the document sued on is not transferable by indorsement, delivery, or otherwise, and that there was no custom in *Rangoon* permitting the transfer by indorsement or assignment of open covers.

(*e.*) That *Macrory* never shipped any rice in the said vessel, and had no insurable interest in the rice shipped therein.

(*f.*) That on the company's refusal to grant Plaintiff a policy he should have insured elsewhere, but did not do so, and that the vessel, having been totally lost at sea before the institution of the suit, the Plaintiff was not entitled to a specific performance of the document sued on.

(*g.*) That the amount at which the Plaintiff valued the rice and assessed his disbursements was excessive.

The Recorder dismissed the Appellant's suit with costs, holding, *inter alia*, that the document sued on was a complete and final contract, binding on the company, if capable of being enforced, but that it was not capable of being enforced, for the reason that *Macrory* had no insurable interest in the subject-matter thereof, and that the Plaintiff claiming as the assignee of *Macrory*, by virtue of his indorsement on the open cover, could claim no higher rights than *Macrory* could claim, and, further, that *Macrory* was not the agent of the Plaintiff in effecting the contract of insurance sued on.

The material passages in the Recorder's judgment are as follows:—

"The Plaintiff first claims as the assignee of *Macrory* by virtue of his indorsement on the open cover; as assignee simply the Plaintiff could claim no higher rights than *Macrory* could claim. *Macrory* admittedly never had any insurable interest in the rice shipped by the *Copeland Isle*. If he had claimed a policy on the open cover, the fact of his having had no insurable interest in the rice would be a complete answer to his claim, for the Court would not compel the Defendants to deliver to him what would be a mere piece of paper of no legal force.

"The Plaintiff, however, sets up a custom or mercantile usage

in *Rangoon* by which the indorsee or holder of an open cover is entitled to a policy irrespective of the person to whom the open cover may have been issued. It would, in my opinion, require very strong evidence to prove that in this town a custom or mercantile usage had sprung up and had gained such force as to override one of the essential principles of marine insurance prevailing through all other parts of Her Majesty's dominions. There is no doubt that the execution of the open cover does constitute the contract for marine insurance, and one of the most essential principles of the law of marine insurance is that the assured must at the time the contract is made have an insurable interest in the subject-matter insured.

"The evidence given to prove the alleged custom or usage is far from proving a general, uniform, notorious, settled and acquiesced-in custom or usage, such as might vary the legal rights of the contracting parties, or create new obligations with other parties. It may be that in some cases policies have been issued on open covers to persons other than the persons to whom the open covers were issued; obviously in the majority of cases it must be a matter of indifference to the insurers whether they issue the policy in the name of the person to whom they issued the open cover, or in the name of the person who may produce the open cover to them; but although such cases may have occurred they would afford no ground for holding that in consequence the principle of marine insurance law which I have mentioned does not apply in *Rangoon*.

"The Plaintiff lastly seeks to get over the difficulty occasioned by the above rule of law by the contention that *Macrory* in effecting the contract was acting as the agent of the Plaintiff, who, of course had an insurable interest in the rice shipped by him. *Macrory* obtained the open cover under the following circumstances, so far as the Plaintiff was concerned; he (*Macrory*) wanting to get a charter for his ship, applied to the Plaintiff, who entered into negotiations with him, and approved of the terms of the proposed charterparty. The Plaintiff, however, made one essential stipulation before concluding the charterparty, and that was, that *Macrory* should produce to him something to shew that insurance risks would be taken by the insur-

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ance companies on the cargo shipped by the vessel. In order to satisfy this stipulation *Macrory* went to various insurance offices, starting with the agents of the Defendant company, and obtained the document sued upon, and four other open covers, which he indorsed over to the Plaintiff, who then executed the charterparty. What happened seems to have been done in pursuance of a practice which has been followed by other local shipowners like *Macrory*, who, according to the evidence of Mr. *Borland*, apply to insurance agents here for open covers, in order to be able to shew them to persons whom they may ask to charter their vessels, as a guarantee that cargo shipped by them will be insured.

"Under the circumstances stated I do not think it can be said that the relation of principal and agent can be said to have existed between the Plaintiff and *Macrory*. At the time when *Macrory* was effecting the arrangements he made with the insurance agents it was quite uncertain whether the Plaintiff would ship any rice on board the vessel."

Barnes, Q.C., and *Agabeg*, for the Appellant, contended that he was entitled to judgment. As regards insurable interest the Recorder erred in holding that an insurer must have an insurable interest at the date of contract. That has not been the law for the last 100 years; it is sufficient if he has an interest at the date of loss. Whether *Macrory* had an insurable interest or not was immaterial; either way he could contract for the benefit of the shipper of the goods insured. There was nothing either in the law or the custom to prevent him from doing so, or to prevent the Appellant from adopting and suing upon the contract so made. He did adopt it when he signed the charterparty on the faith of it, and from that moment there was a completed contract between him and the Respondents. Reference was made to *Sutherland* v. *Pratt* (1); *Irving* v. *Richardson* (2); *Routh* v. *Thompson* (3); *Fisher* v. *Liverpool Marine Insurance Company* (4); *Arnould* on Insurance, 4th ed. p. 1027, and the cases there cited.

(1) 12 M. & W. 16.
(2) 2 B. & Ad. 193.
(3) 13 East, 274.
(4) Law Rep. 9 Q. B. 425.

Cohen, Q.C., and *Arbuthnot*, for the Respondent, contended that the Recorder's judgment was right. *Macrory* had no insurable interest either at the date of contract or the date of loss, and therefore could not make for himself a contract of insurance. He could not transfer such invalid contract, either by law or by the alleged custom, so as to give the transferee greater rights thereunder than he had himself. The finding of the Recorder that *Macrory* was not the agent of the Appellant to make this contract on his behalf was right according to the evidence, and ought not to be disturbed. Besides, the document given by the Respondents to *Macrory* was never intended to be, and was not given as an "open cover." Its effect was a representation by the company that it considered the vessel a fair risk, and that it would be willing to negotiate a policy in respect of cargo shipped thereon. Reference was made to *Dickinson* v. *Dodds* (1); *Mackenzie* v. *Coulson* (2). Even if the open cover constituted an offer there was no unqualified acceptance of it within a reasonable time.

Barnes, Q.C., replied, citing *Weidner* v. *Hoggett* (3); *Fry* on Specific Performance, sect. 445; *Great Northern Railway Company* v. *Witham* (4); *Ionides* v. *Pacific Insurance Company* (5); *Morrison* v. *Universal Marine Insurance Company* (6).

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The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Appellant in this case brought a suit against the Respondents for specific performance of a contract of insurance. The Recorder of *Rangoon*, in whose Court it was brought, dismissed the suit, with costs, and this appeal is from that judgment.

In March, 1885, one *John Macrory*, a shipbuilder and owner of a vessel called the *Copeland Isle*, then lying in *Rangoon* river, applied to the Plaintiff, a merchant carrying on business at *Rangoon*, and also at *Calcutta* and *Bombay*, to charter that vessel.

(1) 2 Ch. D. 463.
(2) Law Rep. 8 Eq. 368, 374.
(3) 1 C. P. D. 533.
(4) Law Rep. 9 C. P. 18.
(5) Law Rep. 16 Q. B. 674.
(6) Law Rep. 8 Ex. 40; see also *Lishman* v. *Northern Maritime Insurance Company*, Law Rep. 8 C. P. 225.

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The evidence of the Plaintiff, who was examined as a witness, was as follows:—

"I said to *Macrory*, that if an open cover were given to me free of particular average I would charter the vessel. When the charterparty was drawn and brought to me by *Macrory* and *Sutherland* (one of the brokers who arranged the charter), I said, 'Where is the open cover?' Then Mr. *Macrory* gave me this open cover, with these five others. When I got these the charterparty was signed by me. I shipped goods on the *Copeland Isle*, I shipped my own goods, 6220 bags of rice. This is a copy of the charterparty. Subsequently I went to Messrs. *Finlay Fleming*, Messrs. *Strang Steel*, and Messrs. *Gladstone Wyllie's*, for policies on the covers. I got policies from all, except from Messrs. *Gladstone Wyllie*. I went to *Gladstone Wyllie's* and saw Mr. *Bertram*. I went three times to them before I wrote to them. Once I saw Mr. *Bertram*, and twice Mr. *Gordon*. I shewed *Bertram* the open cover and asked him for policies for Rs.100,000, for 1000 bags of rice, and Rs.5000 for disbursements. Mr. *Bertram* said, 'We have given a policy to a chetty.' That was, I believe, for Rs.17,500. I said, 'I have no concern with the chetty's policy. I want the policy for my goods.' *Bertram* said he would not give one. I then went to *Gordon*, who was the then manager of *Gladstone Wyllie's*. *Gordon* said, 'I cannot give a policy, go to Mr. *Macrory*.' I went that day or the next day, with *Macrory* to *Gordon*. *Macrory* asked *Gordon* to give the policy, as the ship was to be cleared. He spoke for a long time and so did I. We both pressed *Gordon* to give one, but he said he would not. Then I said, 'If you do not give one I will send the customary notice.' Afterwards, I addressed a letter to *Gladstone Wyllie*, as the agents of the Defendants' company."

The open cover was in these terms:—

"*Rangoon*, 9th March, 1885.

"*Netherlands India Sea and Fire Insurance Company of Batavia.*

"Dear Sir,—We hereby consider you insured under an open cover, to the extent of Rs.15,000 only, on rice per *Copeland Isle*, Captain , *Rangoon* to *Bombay*.

"Premium, 2 per cent.
"Free of war risks.
"Average f. p. a.
"Policy to be applied for before the ship sails, and vessel to be towed by steamer to sea.

"Yours faithfully,
"*Gladstone Wyllie & Co.*,
"J. R. BERTRAM,
"Agent in *Rangoon*.

"To *R. Macrory*, Esq."

(On the back.) "J. MACRORY."

The letter to *Gladstone Wyllie* as the Defendants' agents abovementioned, was dated the 31st of March, 1885, and requested them to declare policies of insurance on 1000 bags of rice, value Rs.10,000, and on disbursement of the vessel from *Rangoon* to *Bombay*, Rs.5000, and it enclosed Government promissory notes for Rs. 300 for the premium. *Gladstone Wyllie & Co.*, replied by letter dated the 1st of April, 1885, saying, "As we did not grant you an open cover by the *Copeland Isle*, we regret we cannot issue a policy, and we return Rs. 300, in Government currency notes which you sent us." On the 1st of April the Plaintiff again wrote, stating that *Macrory* had transferred the open cover to him, and enclosing it with the Government notes, to which *Gladstone Wyllie & Co.* replied on the 2nd of April, that they could not recognise the transfer by *Macrory* of the open cover, and that they never entered into any engagement to grant the Plaintiff a policy for Rs.15,000.

Although the Plaintiff at the interviews with *Bertram* and *Gordon*, and in his letter of the 31st of March, asked for two policies, he appears not to have insisted upon having the insurance in that way, and the Defendants' agents did not take the ground that the open cover did not bind them to give a separate policy for disbursements, but absolutely refused to issue any policy. Their Lordships think the Defendants cannot say that the Plaintiff was not willing to take a policy on rice for Rs.15,000. Whether upon such a policy he could recover the disbursements or the Rs. 4000 advanced on account of freight it is not now

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necessary to determine. In his plaint he has simply asked for a policy of insurance in terms of the open cover.

When the Defendants' agents refused to issue a policy to the Plaintiff, he endeavoured to obtain an insurance on the cargo uninsured from other offices in *Rangoon* and *Bombay*, but did not succeed. The *Copeland Isle* proceeded on her voyage to *Bombay* on or about the 1st of April, 1885, and was totally lost in a cyclone on the following 10th of June.

To return to the evidence. About the open cover, *Macrory* said (omitting passages which it is not necessary to read):—

"I remember this open cover. I got it for the charterer, *Bhugwandass*. I was to see if an insurance could be effected on the cargo before he would sign the charterparty. I made it over to *Bhugwandass*, and indorsed it. . . . I made all the covers over to him on his signing the charterparty. . . . I saw Mr. *Gordon* when I first got this open cover. . . . I asked Mr. *Gordon* if he would take a risk, as I could get a charter if he would take a risk. I did not say that I only wanted it to shew to other companies, and not as an undertaking to issue a policy. . . . Mr. *Bertram* was present in *Gordon's* room when I had the conversation with Mr. *Gordon*, and immediately after I got the open cover . . . I went out of *Gordon's* room with *Bertram*. I got the open cover from *Bertram* in his room. I talked to *Bertram* there about the ship and the money I had expended on her, and the condition she was in. I said that if I could get an insurance I could effect a charter. I mentioned *Bhugwandass* as the charterer. . . . I asked *Gordon* whether he would insure a part of the cargo, or as much as he could take. When he said that he could take up to Rs.15,000, I asked for an open cover to that effect. I think the open cover was taken out of a book. I do not remember who put the stamp on."

Mr. *Gordon* was not examined as a witness, and there was a satisfactory explanation of this omission. Mr. *Bertram* was examined, and said:—

"I am an assistant in the firm of Messrs. *Gladstone Wyllie & Co.*, in *Rangoon*. The firm are the agents of the Defendants' company in *Rangoon*. I saw *Macrory* on the 9th of March, 1885, with reference to the vessel the *Copeland Isle*. He came

to me personally at half-past two. . . . . He asked me for a chit to shew the other insurance offices that we were prepared to take insurance on the *Copeland Isle;* of course that had reference to what had previously taken place when the matter was arranged by Mr. *Gordon*. . . . . I heard *Gordon* tell *Macrory* that he would be willing to take a risk up to Rs.15,000 on the vessel for the Defendant company. . . . . At this second interview *Macrory* asked if we would give him a letter to shew to *Steel's* and to *Finlay's* so that they could see that we were willing to take insurance on the vessel. I gave him a paper. This (the open cover) is the paper I gave. I used this form because he wanted something definite to shew to people, mere word of mouth not being sufficient. I chose an open cover form because it was the most convenient thing we had, and it was much easier for me to fill up this form than to write an open letter. . . . . We said that we were prepared to accept a risk on the *Copeland Isle* to the extent of Rs.15,000. Nothing was said about giving an open cover or a policy. *Gordon* said this. . . . . We knew at the time *Macrory* had no rice to ship."

Mr. *John Anderson*, a witness for the Plaintiff, whose firm are agents for several marine insurance companies in *Rangoon*, said:—

"An open cover is issued generally before the shipment of the goods to be insured. After the goods are shipped the party producing the open cover gets a policy on payment of the premium. I do not know if we ever had a case of the kind, but our firm would issue a policy to the person producing the open cover to us, notwithstanding the open cover had been issued in another person's name. On cross-examination he spoke to the same effect.

Mr. *John Borland*, another witness for the Plaintiff, whose firm at *Rangoon* also are agents for several marine insurance companies, said:—

"If we issued an open cover to *A.*, and afterwards *B.* shipped the cargo, we should have no objection to issuing the policy to *B.*" And on cross-examination,—"I have many times issued an open cover to a man who has not an insurable interest. If *Macrory* came to us and told us he could not get a charter unless he got open covers on the cargo to be shipped, we would issue open covers to him, and look to him for the premium until we

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had intimation that the cargo had been shipped by some one else, and that the open cover was held by the shipper."

Upon the evidence in the suit their Lordships have come to the conclusion that the open cover was given to *Macrory* in order that he might give it to the charterer of the vessel, and that it was a proposal to insure. Although addressed to *Macrory*, it could not have been intended for his acceptance, as it was known that he was not going to ship the rice. When he handed it to *Bhugwandass* it was a subsisting proposal capable of being accepted by him, and when *Bhugwandass* went to *Gladstone Wyllie's* and shewed *Bertram* the open cover, and asked him for policies, there was an acceptance of the proposal so as to make a binding contract with *Bhugwandass* to insure and issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient, as *Bertram* absolutely refused to give any policy.

The letter of the 1st of April, 1885, refusing to issue a policy, and of the 2nd of April, refusing to recognise the transfer to *Bhugwandass* of the open cover, have been noticed. It is to be observed, that neither in the interviews with *Bhugwandass*, nor in the letters, was it said that the paper given to *Macrory* was not intended to be an open cover. Indeed, in the letter of the 2nd of April it is so called. It was argued by the learned counsel for the Appellant that the contract became complete when the charterparty was signed, and the proposal to insure was acted upon. It is not necessary for their Lordships to give any opinion upon this contention, as they hold that the acceptance by *Bhugwandass* was made whilst the offer to insure was subsisting, and was sufficient to complete the contract. The Plaintiff is entitled to specific performance, and their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to make a decree that the Defendants or their agents do make and issue a policy of insurance in terms of the open cover, and for the amount therein mentioned, and do pay the costs of the suit. The Respondents will pay the costs of the appeal.

Solicitors for Appellant: *Bramall & White.*
Solicitors for Respondents: *Freshfields & Williams.*

Reported also 14 LR 16 Cal 397

SHANKAR BAKSH . . . . . DEFENDANT;

AND

HARDEO BAKSH AND OTHERS . . . . . PLAINTIFFS.

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Nov. 13, 14, 15.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Law of Oudh—Sunnuds—Family Arrangement contrary to Sunnud—Partition of Oudh Joint Family Estate—Mesne Profits.

Followed 14 LR 15 Bom 253.6

Case in which it was held upon the evidence that although two sunnuds had been granted by the Court of certain *Oudh* estates, one recognising a division into shares of the estates to which it related, the other establishing primogeniture, yet that by family arrangement between the co-heirs all were held by the co-sharers in specific and definite shares.

Although in a partition suit relating to an ordinary Hindu joint family mesne profits are not recoverable, yet a right to sue therefor exists when the enjoyment of specific and definite shares has been disturbed.

Cited 14 LR 20 Bom 328

APPEAL from a decree of the Court of the Judicial Commissioner (March 12, 1883) affirming a decree of the District Judge of *Sitapur* (Sept. 16, 1882) in favour of the Respondents, who had sued to establish against the Appellant their right to partition of a 10-annas share of a taluqdari estate called *Rampur Kalan*, and also of certain moveable estate with mesne profits.

The Appellant's contention was that under the terms of the sunnud granted to his grandfather, *Dariao Singh*, on the 11th of October, 1860, the taluq was descendible to him as the nearest male heir, according to the rule of primogeniture, and that the Respondents were therefore not entitled to partition of the taluq of *Rampur Kalan*, whatever might be their rights to share in the profits.

Referred to 14 LR 21 Bom 462 - 16 Bom 38 LR 8 IA 123 par Cal 14 LR 16 Cal 765

The Courts below concurred in holding that that sunnud was nullified or superseded by the family arrangements, under which the Respondents acquired separate interest in the taluq and a consequent right to partition as prayed by them.

The facts are stated in the judgment of their Lordships. The

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material portion of the Judicial Commissioner's judgment was as follows:—

"I also agree with the District Judge that the fact that a primogeniture sunnud was granted to *Dariao Singh* cannot deprive his younger sons of rights which were acknowledged before the grant of that sunnud and were admitted and recorded in the settlement papers after the grant of that sunnud.

"All the evidence tends to shew that though the members of the family had agreed as to the manner in which the property should be divided if a separation should take place they continued to live as a joint family. Had *Hardeo Baksh*, for instance, had no share in the estate, villages would not have been purchased in his name from the profits of the estate. But the main contention is that after the declaration of definite and certain shares, the joint family could no longer exist: such a declaration being incompatible with the status of a united family.

"It appears to me that the intention of the parties must be looked to. In the settlement records the share of each brother was recorded but no separation ever took place. The members of the family continued to live together, there was no division of profits, there was nothing in fact to shew that any separation of right or of property took place or was intended to take place. The family having recorded that the share of the elder branch should be six annas and the shares of the younger branches five annas each continued to live in union. The arrangement could not come into effect till the family separated. Acting on this arrangement the Plaintiffs have now sued for their share as representatives of the two younger branches, not for their legal shares as three members of an undivided Hindu family.

"I am of opinion that though the share which each branch should eventually have was defined, anything like an actual separation of right or of property was indefinitely postponed, and that the family still remained joint and undivided."

The Appellant applied to the Judicial Commissioner for leave to appeal to Her Majesty in Council from these concurrent decisions, and on the 8th of September, 1883, obtained a certificate under sect. 600, Act XIV. of 1882. Then, on the 13th of June,

1884, he applied to the same Court, stating as follows:—"I possess documentary evidence to shew that a forged document has been filed by Plaintiffs Respondents, therefore I wish to withdraw my appeal to the Privy Council and file an application for review of judgments. Therefore, I pray that this application for permission to appeal to Her Majesty's Privy Council be consigned to the records, and the security bond and amount of costs deposited by me to be returned to me." On that application the following order was passed on the same day:—"Let the application for permission to appeal to Her Majesty's Privy Council be struck off the file, and the security bond and the cash deposited by the Applicant, after deduction of charges incurred, be returned to the Applicant."

On the 16th of June, 1884, the Appellant prayed that, notwithstanding the order of the 13th of June, 1884, his appeal be allowed to proceed to the Privy Council, and on the 28th of July, 1884, the Judicial Commissioner accordingly directed that the appeal be re-admitted on the register, and proceed to the Privy Council.

Doyne, for the Appellant.

Thomas, and *C. W. Arathoon*, for the Respondents.

Thomas objected that the order of 28th of July, 1884, was made without jurisdiction, that the right of appeal was gone, and no special leave had been obtained.

LORD HOBHOUSE:—It is open to Mr. *Doyne* to apply now, but we will hear the facts of the case first.

Doyne, for the Appellant, contended that the sunnud of the 11th of October, 1860, was binding on all the parties to the suit. Under its terms the taluq of *Rampur Kalan* descended indivisibly, and effect should be given to those terms whereby the Appellant succeeded as next heir. The terms of the family arrangement applied merely to the profits. In ordinary cases they would be entitled to maintenance only. If in this case they be entitled to shares of the profits, that was in lieu of maintenance and in order to measure the amount of the maintenance. It was not intended,

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that they should have, contrary to the terms of the sunnud, a right to partition. They could compel the Appellant to come to a division of profits, but not to divide the *corpus* of the estate. He was entitled to retain that in his own hands with the title of taluqdar. The Respondents were not in any view entitled to mesne profits. Reference was made to *Hardeo Baksh* v. *Jewahir Singh* (1); *Pirthi Pal Singh* v. *Jewahir Singh* (2); *Widow of Shunker Sahai* v. *Rajah Kashi Pershad.* (3)

Thomas, and *C. W. Arathoon*, for the Respondents, were as to the merits called on solely as to the question of mesne profits, but were also heard as to the effect of the appeal having been struck off by the Judicial Commissioner and then re-admitted long after date. It was contended that the Civil Procedure Code did not authorize a review of an order striking off an appeal. Reference was made to sect. 599: *Radha Benode Misser* v. *Kripa Moyee Debia* (4).

Doyne replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The principal question raised in this case is whether certain estates which belonged to *Dariao Singh*, taluqdar of *Rampur Kalan*, go according to the law of primogeniture, or are subject to a family arrangement by which they were divided into shares? The principal estate is known by the collective name of *Rampur Kalan*. It was an estate which was subject to the common Hindu law of *Oudh*—the Mitakshara law. It was confiscated with other *Oudh* estates, and it was restored to the family by sunnuds. The only material difficulty that exists in the case is owing to the circumstance that two different sunnuds were granted for the purpose of the restoration, one recognising a division into shares, and the other establishing primogeniture.

Their Lordships have not to deal with the difficult question

(1) Law Rep. 4 Ind. Ap. 178; 6 Ind. Ap. 161.

(2) Law Rep. 14 Ind. Ap. 37, 43, 52.

(3) Law Rep. Ind. Ap. Sup. Vol. p. 220.

(4) 7 Suth. W. R. F. B. 531.

which has been agitated in so many cases here, whether, to use rather a popular than a legal term, equities shall prevail against the form of the sunnud; because, although it was maintained in the Courts below that the primogeniture sunnud was to prevail against all inferences to be drawn from the transactions among the family, yet that position has been abandoned now, and Mr. *Doyne* has very candidly stated that he cannot resist the conclusion that, as regards the beneficial interest in the profits, there must be participation between the members of the family. But what he maintains is that the arrangements led to this inference, that the family was still to have a sole head to it, and that he would take the title of taluqdar, and have the management of the property, and though he would be accountable to his brothers, the younger branches, for certain shares of the profits, yet the property was still to be held in one hand as an entire estate; and that they could not displace the head of the family from that position.

It is extremely difficult to understand what sort of an estate that would represent. It would be a kind of trusteeship, managership, or headship, which could never be displaced or disturbed by the persons having the beneficial possession. Such an estate is entirely foreign to the common Hindu law of *Oudh*. Nor is any such thing apparently contemplated by the *Oudh Estates Act*. Their Lordships do not pronounce an opinion here whether it could legally exist; but assuming that it could, there must be some very clear arrangements between the parties to prove its existence.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have a partition. In the last case of *Hardeo Bakhsh* (1) that of *Pirthi Pal Singh and another* v. *Thakur Jewahir Singh* (2), very much the same sort of contention was set up. Let us take the statement of the Defendant's contention—he was the head of the family—from page 60 of the report. *Jewahir Singh* prayed a declaration that he was entitled to hold the property "as an integral, impartible, and indivisible estate or taluqa subject to the beneficial interest of the Defendant in respect of the profits thereof to the extent of his share as

(2) Law Rep. 14 Ind. Ap. 37.

(1) I. L. R. 4 All. 493

(1) [illegible]; L. R. 6 Ind. App. 1

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declared by the Court. Sir *Richard Couch* delivered the judgment of the Committee, and observes that *Jewahir Singh* did hold the estates in "trust for the joint family, but as a joint family estate they were subject to partition, and as a trustee he is bound to allow the partition to be made."

Their Lordships then ask what is the evidence in this case to shew that there was an agreement between the members of the family that the head of the family should continue to hold the estate as an entire estate, and hand over the profits? To answer that question it is necessary to touch upon the heads of the case; but owing to the position the argument has assumed, it will not be necessary to go with great particularity into the documents.

It appears that in 1856 a temporary settlement was made, which by the desire of *Dariao Singh*, the then head of the family, was in the names of his three sons *Anant*, *Bulwant*, and *Hardeo*, and a grandson, who was the son of *Bulwant*. *Bulwant* and the grandson took one share between them, and the grandson's name may be left out of our consideration. The estate was settled in definite shares, nearly equal, but giving a slight preference of three pies to *Anant*, the eldest son.

It next appears that a sunnud, of which we have no copy, was issued on the 25th of October, 1859, in the terms of that temporary settlement. In December, 1860, came the circular that was issued to the *Oudh* taluqdars, calling upon them to elect whether they would take their sunnuds according to the common law of the Mitakshara or according to the law of primogeniture. It is impossible to read that circular without seeing that the officials then were desirous that the taluqdars should choose the primogeniture sunnuds. To that circular *Dariao* made a reply to this effect: "That at the time of the settlement of 1264 F., in order to avoid future dispute, and according to the custom prevailing in his family, he caused a kabuliat to be executed;" and then he states that it was executed in the manner which has been mentioned: "The sunnud dated 25th October, 1859, has been granted by the Chief Commissioner according to the above terms. The Petitioner has now no occasion to apply for a fresh sunnud, because the aforesaid sunnud is enough for them." Therefore he distinctly elects to take a sunnud which recognises

the co-sharing of all his sons. That election of his is the more pointed because there were two other villages, not then part of *Rampur Kalan*, though they have since become part, *Saraian* and *Piprawan*. Those were granted by Government to *Dariao Singh* in consideration of loyalty; and as to those he prays that: "*Saraian* and *Piprawan* be, after the Petitioner's death, in the name of *Anant Singh*, the eldest son, in addition to the 5½ annas shares out of taluqa *Rampur Kalan*." *Dariao Singh* knew perfectly what he was about, and he elects that as to *Rampur Kalan* it shall go in shares, and as to the two other villages they shall go according to primogeniture.

It is a very strange thing that in answer to that request of *Dariao Singh*, the officials should have sent him a primogeniture sunnud; but they did so. It was dated, strange to say, before the date of *Dariao's* answer. *Dariao's* answer was on the 29th of January, 1861; and the sunnud is dated on the 11th of October, 1860. It was cut and dried ready to issue. When precisely it was received by him does not appear, but it was some time between the 13th of December, 1860, and the 14th of April, 1863. No remark was made upon it. Whether he did not observe that the wrong sunnud had been sent to him, or whether he did what is so exceedingly common for Indian gentlemen to do, thought it was best not to be offensive, and to comply with the wish of the Sircar, we do not know. In point of fact no remark was made upon the sunnud at that time.

Only one event took place between *Dariao's* death and the receipt of the sunnud having any bearing on the question, and that is, that *Dariao* personally accepted and agreed to pay the Government jumma, and it would seem that his name was entered in the Collector's books as the taluqdar.

Nothing further occurred until the 2nd of September, 1867, when *Dariao* died; and then came the necessity for a mutation of names; and what took place upon that occasion is, as their Lordships think, the most important feature in the whole case. It is very unfortunate that these documents have been tossed together in a way that makes it difficult to disentangle the proceedings. It will be best to take the case of *Saraian* first.

On the 13th of November, 1867, the tahsildar of the district

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made a statement regarding the death of *Dariao*, "lambardar of village *Saraian*," and after shewing that his heirs were his three sons, he names as the heir able to become lambardar, *Anant Singh*, that is the eldest son. Then he enters a remark, "*Dariao Singh*, lambardar, has left three young sons; *Anant Singh*, the eldest son of the deceased is able to become a lambardar"; and he states that: subject to notice, *Anant Singh's* name deserves entry in the register. But *Anant Singh* was not willing to accept that position, and he presents a petition. In that petition he says that "there has been unanimity without 'any feeling of estrangement' between him and his brothers, and he prays that their names may be entered along with his in the column 'Name of lambardar.'"

It is difficult to trace the exact proceedings further in respect of *Saraian*; but it is clear that in the result *Saraian*, though clearly granted in primogeniture, was entered in the four names of the three sons and the one grandson.

Turning to *Rampur Kalan*, we again find that *Anant Singh* was not desirous of appearing as the sole taluqdar. He was called upon to present a fautinama for mutation of names on his father's death. He sends one as to *Saraian*, and excuses himself as to *Rampur Kalan*. The three brothers present a petition on the 7th of April, 1868, saying, "that the kabuliat of ilaka *Rampur Kalan* has stood in the name of the petitioners, and a sunnud has also been granted in their name; such being the case, a fautinama should not be called for in respect of *Rampur Kalan*," meaning that no alteration of name was necessary. A fautinama, however, appears to have been insisted on, and one is sent on the 11th of April, but with a protest in the shape of a deposition by *Anant*. He there states that his father's name was entered as proprietor for *Saraian* only, but since 1264 Fusli "my name and the names of *Bulwant Singh* and *Hardeo Baksh*, my brothers, have been entered in the column 'Name of proprietor,'" in respect of the rest of taluqa *Rampur Kalan*. The deceased's name was not there; moreover the Government has granted a sunnud in the name of us three brothers." Then he adds his desire that, "the names of the three brothers be also entered in the column 'Name of lambardar.' Since 1264 F. the names of us three

brothers have been entered in respect of all the villages of taluqa *Rampur Kalan* which are situated in tahsil *Biswan;* and our names were also entered in respect of certain other villages, but as *Dariao Singh,* my father, used to remain with the settlement officer, and was my superior, therefore at the time of assessment of the present settlement Jama his name was entered in respect of these villages; I now desire that jointly with my name the names of *Bulwant Singh* and *Hardeo Bakhsh,* my brothers, be entered as before in equal shares in these villages also;" a most distinct return to the state of things which existed before this primogeniture sunnud was sent wrongly to *Dariao Singh,* and his name was entered in the Collector's book.

The proceedings seem to have occupied a considerable time. No order was made until the 29th of April, 1869, when an order was issued in this form by the Deputy Commissioner:—"The case is before me for an order as to mutation of names. There is no one to dispute the title of these sons. The hitch, if any, is the fact that *Jagan Nath* (*Bulwant Singh's* son) is entered in the Malguzari Register: it must remain there." He was an infant at that time. "Mutation of names is to be in the name of all four: *Anant Singh; Bulwant Singh; Hardeo Bakhsh,* and *Jagan Nath.*"

The same sort of proceedings took place in respect of *Piprawan,* but it is not necessary to follow them out with the same particularity. The result is summed-up by the Deputy Commissioner in the year 1841 in a judgment which he delivered on an application for partition, which is quoted in the District Judge's judgment in this case. He says: "In the khewats prepared at regular settlement the shares in the whole ilaka, and also in the grant, were defined as follows: *Amant Singh,* 6 annas, and the other two sons 5 annas each. These shares are slightly different from what was stated by *Dariao Singh* in his letter of the 19th of January, 1861." That was in answer to the circular about the sunnuds. "By this new arrangement the eldest son, *Anant Singh,* gave up his exclusive right to two mauzas, and he was recorded as proprietor of a 6-anna share in the whole estate instead of 5½-anna share in part of it. The khewats were signed by *Anant Singh* with his own hand."

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That was the result. These proceedings shew exactly the footing on which the family stood. It is not a question whether *Anant Singh* made a conveyance to his brothers; though if that had been the question there might be reason to maintain the affirmative. As to *Piprawan* and *Saraian* he did most distinctly make a conveyance because those were granted according to the law of primogeniture. He took a consideration for it by receiving a larger share in the whole estate. But the value of the proceedings is to shew that from 1856 onwards the estate had been treated, notwithstanding the issue of the primogeniture sunnud, as an estate which was held in the shares designated in *Dariao's* letter.

There are many other things in this record which shew the same condition of the family, but their Lordships think it not necessary to refer to them, because what has been stated is quite sufficient. But some notice must be taken of those things which, according to the contention of the Appellant, would lead to the contrary inference. Mr. *Doyne*, in his argument, referred to three circumstances. One was that *Anant Singh* has rested his title, not entirely on the earlier sunnud, but on both sunnuds. Another is that in the lists of taluqdars that were made out, *Dariao Singh's* name was entered in respect of *Rampur Kalan*, in list No. 3, which is one of the primogeniture lists. Another is that in the wajib-ul-arz, which seems to have been framed either under the signatures, or with the assent, of the three brothers, they claim that the succession is to go according to sect. 22 of the *Oudh Estates Act*, which relates to the primogeniture estates.

With respect to the reliance on the two sunnuds, that is contained in a statement which is called a petition; but it is a statement of *Anant Singh's* made on the 9th of July, 1868, in the course of the proceedings for mutation of names. All he says is this: he mentions the earlier sunnud, and then he says that, "a fresh sunnud in English and Persian in the name of the Petitioner's father (deceased) has been granted as an additional favour, so the taking effect of both the sunnuds is the cause of further stability of the (ilaka) estate." He then goes on to reiterate the case for partition:—"From 1263 F. up to 1266 F.,

and up to this day, the settlement of ilaka *Rampur Kalan* has been in the name of the Petitioner, *Bulwant Singh, Hardeo Baksh,* and of *Jagan Nath Singh,* son of *Bulwant Singh,* and in the registers of the Collector's Court, and of the Tahsils, the above-mentioned names are entered all along; such being the case under the rule laid down in the Directions of the Revenue Officers, mutation of names should be effected without any alteration in the names entered as proprietors." That is the occasion on which he mentions both sunnuds. But on the very same occasion he also states that the estate is held in coparcenery according to the family arrangement, and there is not the least appearance upon the face of this document that *Anant Singh* was considering that there was any conflict between the primogeniture sunnud and the co-sharing of the estate between the family, or that he intended for a moment to set up any claim under the primogeniture sunnud, which was in contravention of the family arrangement.

In March, 1869, the sunnuds were called for, and were sent in for the purpose of preparing the lists. On that occasion, in a petition signed by the three brothers, they prayed that under Rule No. 3 "Our names may be entered in list No. 3"; and the order made by the Deputy Commissioner was:—"Enter names in the list." That order was made on the 10th of March, 1869. Again we find what one must characterise as a most extraordinary proceeding. Instead of entering the names in the list No. 3 as prayed, the name of *Dariao,* then dead, was entered in the list No. 3, so that according to the effect of that list the estate would go by the rule of primogeniture, and go to *Anant* alone, instead of being divided among the three. It does not appear that any explanation was given to these gentlemen, that any questions were asked of them, that it was pointed out to them that there was an inconsistency between the entry in list No. 3, and the desire to keep the estate in the three names; but there seems to have been, without any further communication, a simple entry of *Daraio's* name in the list. It is impossible for their Lordships to attach importance to such a proceeding as that.

The third document relied on is the wajib-ul-arz which was framed on the 1st of January, 1870; and there, no doubt, occurs

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a passage that "as the proprietors are taluqdars succession will be regulated by sect. 22, Act I. of 1869." Well, that is a matter of law, on which they were not very competent to speak; but on the matters of fact, on which they are the most competent of all men in the world to speak, they have no doubt whatever as to what the state of the family was. They state: "From the death of *Dariao Singh* the sons, the present taluqdars, have continued in possession of the taluq"; and then lower down they say: "This village"—that is *Rampur Kalan*, the whole estate—"is in the possession of taluqdars as a joint zemindary; the shares being as follows": a table shews the shares: *Anant Singh* six annas; *Bulwant* and *Jagan Nath* five annas; *Hardeo Baksh* five annas. "All the co-sharers live in commensality: accounts of profits and losses are not rendered. *Anant Singh*, as head of the family, manages the work of collection and assessment." Now that document is an extremely important document as regards the statements of fact. As regards the statement of law, the succession descending according to sect. 22, it is of little value. The document is a strong assistance to the case of the Plaintiff, and bears directly against the case of the Defendant. In fact, every group of facts that Mr. *Doyne* has referred to as leading to the inference that the estate was to be held by the head of the family as an entire estate, excepting the one fact that there was an improper entry in list No. 3 of the taluqdars, strengthens the case for the co-sharership.

Only one other remark has to be made, which is, that during the life of *Anant Singh* no attempt was made to disturb this state of things. It was after his death, and when his son came to represent the eldest branch of the family, that he was ill-advised enough to set up a claim of primogeniture. Both Courts have decided against that claim. Their Lordships entirely agree with them; and they think that the Plaintiffs are entitled to a decree for partition.

The only other question remaining is that which concerns the mesne profits. In a partition suit, relating to an ordinary joint family, mesne profits are not recoverable, as was pointed out in the judgment at page 59 in the 14th Indian Appeals. Speaking of the provisions of the Code as to mesne profits, Sir *Richard*

Couch says: "These provisions are intended for, and are applicable to, suits for land or other property in which the Plaintiff has a specific interest, and not to the suit which was instituted in 1865, or to a suit for a partition where he has no specific interest until decree." The taluq here in question was in a very peculiar position; the family were living together as a joint family, and in commensality, *Anant* acting as head and not accounting for the profits, which is the case with an ordinary Hindu family; but still they were living under the most distinct agreement that they were entitled not as an ordinary joint family but in specific and definite shares. Their Lordships consider that if the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as a right to partition. Before the suit there seems to have been some inconsistency in the Defendant's position. Sometimes he said his brothers were only entitled to maintenance; at other times that they were entitled to specific shares of the profits. But by the plaint and the written statement the matter was distinctly put in issue. The Plaintiffs claimed between them a 10-annas share of mesne profits. An issue was stated which is perfectly precise upon the point: "For what period are plaintiffs entitled to mesne profits, and what were the aggregate collections for the period claimed?" A commission of inquiry into that question was ordered; but before the commission, although an inquiry was made as to the value of the estate, there was no inquiry as to the profits, because it was considered that sufficient admissions had been made by the Defendant to avoid the necessity of any such inquiry. The exact form in which these admissions were made does not appear, but in the judgment of the District Judge, on the issue that has just been read, the 13th, he finds "that the Plaintiffs are entitled to Rs.20,797 as profits upon the Defendant's own admission." That is in the first judgment which he delivered before the remand. There was an appeal from his decision to the Judicial Commissioner, and, on that appeal, one of the grounds of objection was, "that the Lower Court should have held that the Plaintiffs were not entitled to any profits." The suit was then remanded to the District Judge, not on this ground, but on other grounds, to take oral evidence, and on the remand the District

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Judge came to exactly the same finding with respect to mesne profits. A second appeal was presented to the Judicial Commissioner, and in the grounds of objection upon that second appeal there is no mention whatever of any error as to mesne profits. Therefore, although there are difficulties in understanding the exact grounds upon which the Court came to its conclusion, their Lordships must take it that something passed, either before the Commissioner or before the Court itself, on which that finding was rested, and which must, at the time of the appeal from the decree on remand, have been satisfactory to the parties. The alternative would be a most disastrous one; it would be necessary to send back this case for an inquiry, which might result in something more being found for mesne profits, or something less, but which would probably cost a great deal more than the amount in dispute.

Their Lordships think that they ought not to disturb the decree upon this point, and the result is that the appeal fails on every point, and it must be dismissed with costs. Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitors for Respondents: *Barrow & Rogers.*

Reported also ILR 16 Cal 693

SRINATH DAS . . . . . PLAINTIFF;

AND

KHETTERMOHUN SINGH AND OTHERS . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

J. C.*
1888
Nov. 16, 17.
1889
Feb. 5.

Law of Limitation—Act XV. of 1877, *Art.* 135—*Mortgagor and Mortgagee—Suit for Possession by Mortgagee.*

In a suit in 1882 by a purchaser from a mortgagee after foreclosure for possession against some purchasers from the mortgagor, it appeared that under the terms of the mortgage deed the mortgagor's right to possession determined on the 17th of February, 1866: that on the 31st of March, 1873, the title of the mortgagee as against the mortgagor became absolute by foreclosure under Regulation 17 of 1806; that the mortgagor's purchasers had not been made parties to the foreclosure proceedings, and therefore continued entitled to redeem; that in 1879 the Plaintiff acquired the mortgagee's interest:—

Held, that the suit was barred by limitation under art. 135 of Act XV. of 1877, not having been brought within twelve years from the 17th of February, 1866. The mortgagee's right to possession having been extinct in 1878 was not revived by the *Transfer Act* of 1882.

APPEAL from a decree of the High Court (Nov. 18, 1885) ILR 12 Cal 614 reversing a decree of the Subordinate Judge of the 24-Pergunnahs (June 7, 1883).

The plaint was filed on the 6th of September, 1882, *i.e*, after the Civil Procedure Code of 1882 and the *Transfer of Property Act* of the same year had both come into force; sect. 2 of the latter Act repealed wholly the *Bengal* Regulations 1 of 1798 and 17 of 1806 relating to redemption and foreclosure of mortgages and conditional deeds of sale.

The Plaintiff sued under the sections of the *Transfer of Property Act*, 1882, relating to mortgages, as assignee of the interest which had belonged to one *Shamasoondari Debi* in the lands in suit, and sought to enforce against the Defendants, twenty-nine in number, of whom the first, *Hurrinarain Dey*, was the mortgagor, and the other purchasers subsequent to the mortgage

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, SIR RICHARD COUCH, and MR. STEPHEN WOULFE FLANAGAN.

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of parts of the mortgaged premises, the mortgage securities which as such assignee he was entitled to.

The Courts below differed as to the law of limitation which governed the case as regards the purchasers from *Hurrinarain Dey*.

The facts of the case and the proceedings are sufficiently stated in the judgment of their Lordships.

The decree of the First Court was that the suit should be decreed in terms of sect. 68 of the *Transfer of Property Act*, for an account, payment, and foreclosure in default.

That Court also held on the issue as to limitation that art. 147 of Act XV. of 1877 applied.

The High Court, on the contrary, held that art. 135 applied.

Their judgment on the point of limitation was as follows:—

"The parties to the mortgage of the 17th of November, 1865, were Hindus. The mortgage was a mortgage in English form, giving a power of sale and entry, and the due date was 17th of February, 1866.

"So far as the form of the mortgage is concerned, it is clear that a mortgage in English form between Hindus, of lands in the Mofussil, outside *Calcutta*, is always treated by the Courts as a mortgage by conditional sale.

"In the case of *Khelut Chunder Ghose* v. *Tara Churn Koondoo Chowdhry* (1), Sir *Barnes Peacock* said in regard to the rights of the parties under a deed of this kind: 'The mortgagee was entitled to possession before foreclosure immediately default was made, and he would hold possession subject to his own right to foreclose and the mortgagor's right to redeem. His right to sue for possession did not depend upon his obtaining a decree for foreclosure. The Defendant might have been sued for possession immediately default was made.'

"And in the suit of *Srimati Sarasibala Debi* v. *Nand Lal Sen* (2), it was decided that no suit would lie by the mortgagee as purchaser after breach of the condition, for possession of property on a mortgage in the English form, unless foreclosure proceedings had been taken under Regulation 17 of 1806.

"This case shews that under an English deed of mortgage the

(1) 6 Suth. W. R. 269, see 275. (2) 5 Beng. L. R. 389.

mortgagee had no better right than he would have under an ordinary mortgage by conditional sale, except that a mortgagee with a power of entry on default could sue for possession of property without foreclosure.

"Now, the next point we come to is, what were the rights of a mortgagee in *Bengal*, holding a mortgage by conditional sale? This has been the subject of discussion before their Lordships of the Judicial Committee in the case of *Thumbasawmy Mudelly* v. *Hossain Rowthen* (1). In that case their Lordships decided that before the passing of Regulation 17 of 1806, one of the essential characteristics of a mortgage by conditional sale, was, that on the breach of the condition of repayment, the contract executed itself, and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them. They also held that this was the law in force in *Bengal*, until Regulation 17 of 1806 made provisions for redemption and foreclosure, by the procedure in that Regulation. The effect of that enactment was this, that it put a stop to the mortgage contract executing itself until the year of grace prescribed by sect. 7 of that Regulation had passed. But after the year had passed, the contract, as before, executed itself, and the mortgagee was entitled to have possession given him.

"There is a wide distinction between the rights existing under a mortgage by conditional sale in the Mofussil under the Regulations and those enforced by suit on the original side of the High Court in *Calcutta*. In the Supreme Court, a mortgagee might bring a suit for foreclosure; but no such suit was known outside *Calcutta:* there the foreclosure proceedings took place before the Judge as a ministerial officer, and at the end of the year of grace the mortgagee sued, not for foreclosure, but for possession of the property as owner. This Regulation 17 of 1806 was repealed by the *Transfer of Property Act*, which came into force in 1882. And the only conclusion which can be arrived at, is that up to the passing of the *Transfer of Property Act* at least, no present holder of an English mortgage in the Mofussil could sue for foreclosure properly so called; but must foreclose in the manner prescribed by Regulation 17 of 1806.

(1) Law Rep. 2 Ind. Ap. 241; S.C., Ind. L. R. 1 Madras, 1.

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In the case of *Khelut Chunder Ghose* v. *Tara Churn Koondoo Chowdhry* (1), to which we have already referred, it was held by this Court that under an English deed of mortgage a suit to recover possession of land under the mortgage deed was barred unless brought within twelve years from the date of default. That case was taken on appeal before the Privy Council, and the decision was confirmed. But their Lordships seem to think that the judgment of this Court had laid down a wider rule than was absolutely necessary, and were inclined to hold that if the mortgagor was allowed to hold by permission of the mortgagee after default, a suit might be brought more than twelve years from that date. They said (2): 'No such question, however, arises in the present case, for it is impossible to hold that the Defendant, the purchaser, was holding, or supposed that he was holding, by the permission of the mortgagee; and when both things concur, possession by such a holder for more than twelve years and the right of entry under the mortgage deed more than twelve years old—it is impossible to say that such a possession is not protected by the law of limitation.' This was followed in the case of *Deno Nath Gangooly* v. *Nursing Proshad Dass* (3), and there it was decided that a mortgagee's cause of action arose when default was made in payment of the mortgage debt, and that no new cause of action arose by reason of the foreclosure proceedings after the expiry of the year of grace, and that such a suit was barred as against an auction-purchaser within twelve years from the due date.

"The other branch of the case may be illustrated by the case of *Mankee Kooer* v. *Sheik Munnoo* (4). In that case it was decided that where the mortgagor was shewn to have paid interest after the date of default, it was held that his possession being thus shewn to have been permissive, he might be sued more than twelve years after the date of default.

"From these decisions it would appear that under Act XIV. of 1859, a mortgagee was ordinarily bound to bring his suit within twelve years from the date of default, and was barred unless it could be shewn (or might properly be inferred) that the

(1) 6 Suth. W. R. 269.
(2) 14 Moore, Ind. App. 150.
(3) 14 Beng. L. R. 87
(4) 14 Beng. L. R. 315.

mortgagor or the person in possession held by permission of the mortgagee after the date of default.

"In Act IX. of 1871, art. 135, it was declared that a suit instituted by a mortgagee for possession of immoveable property mortgaged must be brought within twelve years from the time when the mortgagee was first entitled to possession. And in the case of *Lal Mohun Gungopadhya* v. *Prosunno Chunder Banerjee* (1) it was decided that whether the possession of the mortgagor was permissive or adverse was immaterial, and that the mortgagee having failed to bring his suit within twelve years from the date of default, lost his remedy.

"This seems to have been the received opinion, with one exception, namely, the exception referred to in *Ghinaram Dobey* v. *Ram Monaruthram Dobey* (2), and in *Bromhomoyi Dasi* v. *Jugobundhu Ghose* (3), in which it was held that if the mortgagee could complete the foreclosure proceedings in a District Court within twelve years from the date of default, he then became absolute owner of the property, and the foreclosure proceedings gave him a new period of limitation.

"A distinction between the decision in this case and the other cases already referred to has been pointed out in *Modun Mohun Chowdhry* v. *Ashad Ally Beparee* (4).

"After the repeal of Act IX. of 1871, the present law, Act XV. of 1877, was enacted. In it a new clause is inserted, *viz.*, clause 147, by which a suit by a mortgagee for foreclosure or sale can be brought within sixty years from the time when the money secured by the mortgage becomes due. But, as we have already said, no suit for foreclosure could ever be brought in the Mofussil. This was prohibited by the nature of the agreement and by the terms, to which we shall refer later on, of Regulation 17 of 1806. Under the contract a mortgagee was originally the absolute owner from the date of default. But by Regulation 17 of 1806 it was a condition precedent to his becoming an absolute owner that foreclosure proceedings should be taken in the District Judge's office.

"When this has been done, a mortgagee having become

(1) 24 Suth. W. R. 433.
(2) 7 Calc. L. R. 580.
(3) 7 Calc. L. R. 583.
(4) Ind. L. R. 10 Calc. 68.

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absolute owner by virtue of the contract, sues, not for foreclosure, but for possession as owner of the property. It appears, therefore, impossible to hold that clause 147 of this *Limitation Act* would apply to any mortgage by conditional sale executed between Hindus and in respect of properties situated in the Mofussil. If that be so, the law of limitation for a conditional sale would be that given in clause 135, corresponding to clause 132 of Act IX. of 1871, namely, twelve years from the time when the mortgagor's right to possession determines. In this case, the mortgagor's right to possession determined on the day of default, namely, February, 1866, and the suit for possession would be barred on the 17th of February, 1878. Does it make any difference under Act IX. of 1871, what the possession was? The suit is barred against the mortgagor himself or anybody else. See cases at 24 Suth. W. R. 433, 13 Calc. L. R. 53.

"We think it well to refer to one argument, which led the Subordinate Judge to hold that after the passing of the Civil Procedure Code, suits for foreclosure would lie in the Mofussil of this Presidency, as distinguished from Regulation foreclosure proceedings, which of course, are not, as above observed, suits in any sense of the word.

"He held that clause 16 of the Civil Procedure Code must be taken to have that effect. It is, no doubt, not applicable to the chartered High Courts, and cannot be explained by reference to their procedure.

"We think that clause has not the effect of creating, for the Mofussil of *Bengal*, a new form of suit, perfectly inconsistent with the express provisions of the Regulation of 1806, which in their terms in sect. 8 expressly exclude any other mode of relief than that provided by them. The Regulation was not repealed by the Code, expressly, and we cannot hold that from the terms of clause 16 of the Civil Procedure Code (and only because that section does not apply to the High Court) it was, by implication, affected. That clause may well be explained upon the supposition that it was intended to apply in the other parts of *India*, where no such law as that of the Regulation of 1816 existed. No doubt the real origin of it, in the form it now bears, was, that, when it was framed, it was intended that the *Transfer of*

Property Act should be passed during the same session as the new Code. An intention which was not, however, carried out.

"We are happy to think that in this case the *Statute of Limitation* operates without harshness, and for the benevolent end for which it is framed. It is certain that several of the Defendants, and probably that all of them, are, or represent, *bonâ fide* purchasers. It is to save the long possession of such persons that the statute is in part intended; and, so far as we can judge from this singular record, no hardship is done in the case. The ground of limitation is one common to all the Defendants except No. 1; and under sect. 544, the decree of the Subordinate Judge, which ought to have been in favour of all those Defendants, is as to all of them, save No. 1, reversed."

Doyne, and *Mayne*, for the Appellant, contended that, as regards the point of limitation, art. 147 and not art. 135 of Act XV. of 1877, governed the case. However that might be, the possession of *Hurrinarain Dey* and his purchasers did not become adverse to *Shamasoondari* or the Appellant on the 17th of February, 1866, so as to bar this suit, which was brought on the mortgage for possession as mortgagee. The frame and prayer of the suit were justified by and in accordance with the *Transfer of Property Act*, 1882, which repealed Regulation 17 of 1806 (see sect. 8 of that Regulation), and with sect. 16, sub-sect. (*c*), of the Indian Civil Procedure Code of 1882. The *Transfer of Property Act* came into force on the 1st July, 1882, and the Appellant thereunder obtained a new cause of action, viz. the right to maintain a foreclosure suit. Under Act XV. of 1877 and the Act of 1882, if a mortgagee sues for possession, art. 135 applies, but if to foreclose sixty years is the limit. Nothing happened between 1878 and 1882 to preclude the Appellant from taking advantage of the new cause of action which was given him in that year. Under three successive laws the mortgagee stood thus. Originally the mortgagor sold with a condition to buy back. On failure to buy back the mortgagee was absolutely entitled. Then came Regulation 17 of 1806, sect. 8, by which a date was fixed for redemption, not invariably enforced, but under which the relations of mortgagor and mortgagee could be determined by prescribed

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proceedings. Then came Act XIV. of 1859, Act IX. of 1871, and Act XV. of 1877. Foreclosure was not a decree under the Regulation; it was a ministerial proceeding to shew that no redemption had taken place, the character of mortgagee was retained, but when that was lost the cause of action was the right to possession. Reference was made to *Bhuwanee Churn Mitr* v. *Jykishen Mitr* (1); *Forbes* v. *Ameeroonissa Begum* (2); *Brojonath Koondoo Chowdhry* v. *Khelat Chunder Ghose* (3); *Hurochunder Goro* v. *Gudadhur Koondoo* (4); *Srimati Sarasibala Debi* v. *Nand Lal Sen* (5); *Denonath Gangooly* v. *Nursing Proshad Dass* (6); and the cases in 7 Calc. L. R. 580, 583.

The Respondents did not appear.

1889 *Feb.* 5.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Appellant, who was the Plaintiff below, is the transferee of a mortgage effected by the first Defendant, *Hurrinarain Dey*, in favour of *Shamasoondari Debi*. The mortgage bears date the 17th of November, 1865. It is in the English form, providing for the payment of the debt on the 17th of February, 1866, and giving to the mortgagor the right of possession until default in payment, and to the mortgagee the right of entry after default. The property mortgaged is in the district of the 24-Pergunnahs.

On the 15th of February, 1872, *Shamasoondari* applied to the District Judge of the 24-Pergunnahs to issue as usual a notice of foreclosure to the opposite party under Regulation 17 of 1806. The opposite party was *Hurrinarain*. The notice was served on him; and on the 31st of March, 1873, a year having elapsed from the date of the service, the case was struck off the file. It is clear, therefore, that *Hurrinarain's* right to redeem was foreclosed, and that as against him *Shamasoondari* became absolute owner on or shortly before the 31st of March, 1873.

In the year 1879 the Plaintiff acquired *Shamasoondari's* in-

(1) S. D. A. (1847), p. 354.
(2) 10 Moore's Ind. Ap. Ca. 350.
(3) 6 Suth. W. R. 269; 14 Moore's Ind. Ap. Ca. 144.
(4) 6 Suth. W. R. 184.
(5) 5 Beng. L. R. 389.
(6) 14 Beng. L. R. 87.

terest in the mortgaged property, and on the 6th of September, 1882, he brought a suit against *Hurrinarain* and twenty-eight other Defendants, whom he alleged to have been holding possession of several plots of the property, claiming by purchase and otherwise from *Hurrinarain*. He stated that they ought to have been made parties to the foreclosure case, but *Shamasoondari* had not done that; that the Defendants knew of the mortgage; that nothing had been paid on account of the mortgage debt, and that the Defendants refused to pay. He prayed an order for payment, and in default a declaration that the Defendants would be unable to redeem the mortgaged properties, and an order for possession.

Hurrinarain has not made any defence at any stage of the suit. Of the other Defendants, some either did not appear or did not put in any statement; one pleaded a mistake of personal identity; and eighteen, besides other pleas, contended that the suit was barred by time. Seventeen of them stated that they held plots purchased of *Hurrinarain* at various dates, ranging from November, 1865, to August, 1866. Some of them stated, as to their own plots, that *Shamasoondari* was privy to the purchases, and that the price was paid to her agent in reduction of the mortgage debt. But as the latest of these alleged transactions was in August, 1866, the difference between the cases of these Defendants need not be considered. One Defendant, No. 29, stated that he had purchased two plots of *Hurrinarain's* land, one in February, 1873, at a revenue sale, the other in December, 1876, at an execution sale. This Defendant stands in a different position from the others as regards both time and the effect of the foreclosure proceedings. But if his title is impeachable at all, which their Lordships are far from suggesting, it must be in a suit properly framed and conducted for that purpose.

With this exception of No. 29, for whose case no issue was framed, their Lordships do not intend to discuss any other plea than that of limitation. Whether the Plaintiff really acquired *Shamasoondari's* interest; whether the Defendant's plots are or are not included in the mortgage; whether *Shamasoondari* was privy to the sale by *Hurrinarain*; whether the purchase-money

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was paid on account of the mortgage; whether the purchasers knew of the mortgage; whether their possession was adverse or non-adverse; all these questions have been discussed, but are immaterial, some in any case, and the others if the suit is barred by time.

The ruling Act is No. XV. of 1877, and the question is whether the case falls within art. 135 or 147. Art. 135 provides that a suit by a mortgagee for possession of immoveable property mortgaged shall be dismissed if instituted after twelve years from the time when the mortgagor's right to possession determines. Art. 147 provides that a suit by a mortgagee for foreclosure or sale shall be dismissed, if instituted after sixty years from the time when the money secured by the mortgage becomes due.

The Subordinate Judge made a decree against all the Defendants without distinction, for payment, and on default for foreclosure. As regards the question of limitation his grounds were as follows,—that if the foreclosure proceedings were regular, a new starting point of time was gained in February or March, 1873; but if they were irregular, the mortgagee possessed only an inchoate right of possession, and so the mortgagor's right had not determined; that suits for foreclosure were under the Codes of 1859 and 1877 allowed in the *Bengal* Mofussil; and that the Plaintiff had a right to bring this suit quite independently of the *Transfer of Property Act* of 1882. These reasons lead up to the conclusion that the case falls within art. 147, which allows sixty years to sue.

From this decree sixteen of the Defendants appealed to the High Court. That Court was of opinion that the mortgagor's right to possession determined on the 17th of February, 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th of February, 1878; that, with the right to possession, was lost the right to take foreclosure proceedings under the Regulation of 1806; and that suits for foreclosure were then unknown in the *Bengal* Mofussil. They therefore concluded that the suit was barred by force of art. 135, and they dismissed it against all the Defendants except *Hurrinarain*. They do not assign their reason for not dismissing it against

Hurrinarain; but their Lordships presume the reason to be that as against him they took the suit to be one for possession founded on the title acquired in February or March, 1873, under the Regulation. From that decree the Plaintiff appeals.

All the Defendants except *Hurrinarain* and one other are made parties respondent to the appeal. No one has appeared, and their Lordships have not had the advantage of hearing argument in support of the decree; but after taking time to consider, their Lordships find themselves in agreement with the High Court.

The inferences of fact which the Court is bound to draw from the evidence or the omission of evidence in the case appear to their Lordships to be as follows: the foreclosure was, as against *Hurrinarain*, perfect on or before the 31st of March, 1873; the purchasers from him were not served with notice as required by the Regulation; they therefore remained unaffected by the proceedings, and the relationship of mortgagee and person entitled to redeem continued to subsist between *Shamasoondari* and them; the purchasers have continued in undisturbed possession since the time of their respective purchases; no interest has ever been paid on account of the mortgage debt; if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August, 1866; therefore if art. 135 is the one applicable to the case, the twelve years there allowed ran out in the month of August, 1878, at the latest.

In order to succeed then the Plaintiff must shew that art. 135 is wholly inapplicable to his case. To do that, it is contended that art. 135 applies only to those cases in which a mortgagee desires to take possession in that character; that if he wishes to foreclose he may do so within the time limited by art. 147; that on the 1st of July, 1882, the right to maintain foreclosure suits was conferred on *Bengal* mortgagees; and that the *Limitation Act* immediately fastened on those suits, and provided sixty years as the limit for them.

To this argument it is sufficient for the present case to answer that in the year 1878, when no suit for foreclosure could be brought, the right of *Shamasoondari* to possession was wholly extinguished, and the title of the purchasers under *Hurrinarain* freed from the mortgage. The subsequent creation of suits for

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foreclosure could not, except by clear enactment, revive the extinct right. And in effect the clear enactment is the other way, for sect. 2 (*c*) of the *Transfer Act* says that nothing therein shall affect "any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of such right or liability." Their Lordships consider that, within the meaning of this section, the rights of the purchasers to unincumbered ownership of their plots have arisen out of the legal relations between them and *Hurrinarain* and *Shamasoondari*.

It is therefore unnecessary to discuss what has been so much urged at the Bar, viz., the effect to be attributed to art. 147, a provision which appeared for the first time in the Act of 1877.

The result is that the High Court decree is right, and should be affirmed, and the appeal dismissed. Their Lordships will humbly advise Her Majesty to this effect.

Solicitors for Appellant: *T. L. Wilson & Co.*

Reported also 14 R 16 Cal 627

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Nov. 21; *Dec.* 19.

KALI DUTT JHA AND OTHERS . . . . DEFENDANTS;

AND

SHEIK ABDOOL ALI AND ANOTHER . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mahomedan Law—Guardian and Minor—Power of Guardian to sell the Minor's immovable Estate.

Where in a suit to have a deed of sale of immovable property set aside on the ground that it had been executed by the father of the Plaintiffs during their minority in excess of his powers as their guardian, it appeared that the transaction, of which the sale was part, was beneficial to the minors and put an end to pending litigation:—

Held, that by Mahomedan law it was within the power of the guardians to execute the deed under such circumstances.

APPEAL from a decree of the High Court (Feb. 8, 1884), reversing a decree of the Subordinate Judge of *Mozufferpore* (Jan. 17, 1882).

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, SIR RICHARD COUCH, and MR. STEPHEN WOULFE FLANAGAN.

The object of the suit was to have a deed of sale set aside which the Plaintiffs' father, *Reazuddin*, had executed on the 7th of May, 1862; during the Plaintiffs' minority, in respect of one anna out of the two annas conveyed thereby of a talook called *Wari*, to the Appellants or their predecessors in estate, for a consideration, so far as regarded the one anna in suit, of Rs.3,117. 8*a*. The ground on which the Plaintiffs impeached the sale, was that their father had not, before the sale, obtained a certificate from the Civil Court to act as their guardian, and that the sale was not made by him, in fact, to pay off any debt due from the Plaintiffs' estate as alleged in the deed of sale, or for their benefit; and they contended that they were therefore entitled to recover back the interest so alienated.

The Defendants, by their written statement, contended that the Plaintiffs were not entitled to a decree for the one anna claimed on (*inter alia*) the following grounds:—

That the Defendants, or their predecessors in estate, had acquired by purchase in December, 1856, from one *Sufdar Hossein*, predecessor in estate of the Plaintiffs, the right to a certain share of talook *Wari*, and by virtue of that right, and also of a right of pre-emption by reason of vicinage, as regarded other interests sold by *Sufdar Hossein* to the Plaintiffs' great grandfather, *Jaffer Ali*, in 1856 and 1857, had instituted five several suits, in which they, the Defendants, claimed 9 annas of the talook, and were also claiming in a resumption suit then, and since 1840, pending before the Collector of the District, the right to settlement with them of the interest which they had so purchased. And that the sale to them by the Plaintiffs' father was made for the purpose of putting an end to litigation, and that the consideration was applied to paying off a debt due from the Plaintiffs', or their mother's estate, to a banking firm styled "*Babu Gopal Das & Babu Bunsi Las Das.*"

They further alleged that the suit was brought by the Plaintiffs in collusion with their father, and they contended that, even assuming that the Plaintiffs' father had no right to sell their interest, his own interest in talook *Wari* equalled, or exceeded, that which he had professed to sell, and that the Plaintiffs had no title to what they claimed.

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The Subordinate Judge dismissed the suit on the grounds—That the Plaintiffs' father, as their natural guardian, could without a certificate sell the Plaintiffs' properties "under legal necessities."

That prior to the execution of the deed of sale in question the five pre-emption suits alleged by the Defendants were pending, and affected the interest of the Plaintiffs' mother in talook *Wari*, and that the sale was effected *bonâ fide* to compromise those suits, and that the consideration was paid to the bankers to an account which stood in their books in the name of *Wasimunnissa*, the Plaintiffs' grandmother, but which was, in fact, the joint account of her and her daughter *Udulunnissa*, the Plaintiffs' mother, and that the Plaintiffs had the benefit of that payment.

And that the Plaintiffs' father, *Reazuddin*, who was by Mahomedan law entitled to one-fourth of his wife's interest in talook *Wari* (*i.e.* to one anna and two-and-a-half gundas), had not, as alleged by the Plaintiff, relinquished that share, and that the present suit had been brought in collusion with him, and that he had evaded the process of the Court to obtain his appearance and evidence.

The Division Bench of the High Court reversed the judgment of the First Court, being of opinion that it was not proved that any money was, prior to the sale in suit, due from the Plaintiffs' estate to the bankers, and that there was no account between the latter and the Plaintiffs' estate. That no benefit had resulted to the Plaintiffs from the compromise of the pre-emption suits, which appeared to have been brought against their mother and another, after her death, and which could hardly have been successful; and that, therefore, the Plaintiffs had not benefited by the sale of their property by their father and guardian.

And the Division Bench, differing therein also from the First Court, were of opinion that the evidence of the Plaintiffs, and especially the language of the deed of sale in question, proved that *Reazuddin* had relinquished his interest in his deceased wife's estate, in consideration of her dower unpaid by him.

The facts of the case are stated in the judgment of their Lordships.

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Doyne, for the Appellants, contended that it had been rightly held on the evidence by the First Court that the sale had been made by the father during the minority of the Plaintiffs as their guardian and for their benefit. It was made to satisfy debts for which their mother's estate was liable. Its effect was to put an end to litigation and thereby obtain from the Collector a permanent settlement of 3½ annas of talook *Wari*.

The Respondents did not appear.

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Dec. 19.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

The suit which is the subject of this appeal was brought by the Respondents to have it declared that a deed of sale, dated the 7th of May, 1862, executed by the Defendant *Sheik Reazuddin Hossein*, the father of the Plaintiffs, was invalid, and for possession of one anna share in talook *Wari*, which was the subject of that deed.

Mahomed Ali, who died in November, 1854, had two wives, *Wasimunissa* and *Fakirunnissa*. By the former he had a daughter, *Udulunnissa*, and by the latter a son, *Mahomed Hossein*. *Udulunnissa* married the Defendant *Reazuddin*, and died on the 26th of October, 1861, leaving a son and daughter, the Plaintiffs. Talook *Wari* had been resumed as invalid lakheraj in 1840, and from that time to its final settlement by the Collector had been temporarily let to various persons. Disputes arose and doubts existed as to the persons who were entitled to settlement, and the final settlement was not made until the 19th of May, 1862. Between 1840 and 1862 there had been various dealings with the talook. It will be sufficient to mention those which affected the parties to this suit. On the 19th of December, 1856, *Syed Sufdar Hossein* executed a deed of sale of 1 anna 3 pie 11 cowris, plus a fraction (which may conveniently be called a 2-annas share) in the talook and its dependency *Sosi Narhat*, in favour of *Bhuput Jha* and *Madhuri Jha* in consideration of Rs.2,250. On the 6th of January, 1857, *Sufdar Hossein* executed another deed by which, after stating the sale of the 19th of December, and that

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owing to the inattention of the purchasers the mutual exchange of equivalents did not take place, and the deed of sale remained with him; and that *Udulunnissa* and *Fakirunnissa* had by their karpurdazes claimed the right of pre-emption by reason of having, previously to the sale to *Bhuput Jha* and *Madhuri Jha*, purchased other shares in the talook, *Sufdar Hossein* sold the 2-annas share to *Udulunnissa* and *Fakirunnissa* for Rs.2,250. On the 11th of August, 1856, the 4th of December, 1856, the 6th of January, 1857, the 29th of January, 1857, and the 23rd of February, 1857, purchases of other shares in the talook and its dependency were made by *Udulunnissa* and *Fakirunnissa*. These shares, together with the share sold to them on the 6th of January, 1857, made up 9 annas of the talook, half of which was declared to belong to each of them. On the 31st of December, 1861, five suits were instituted against *Fakirunnissa* and *Udulunnissa* by *Surdhari Jha*, the ancestor of some of the Defendants, to establish a right of pre-emption to the shares composing the 9 annas, and the Collector had before him these conflicting claims to the settlement.

It was in this state of things that the deed of the 7th of May, 1862, was executed by the duly empowered mokhtar on behalf of *Reazuddin Hossein*, described as the father and guardian of the Plaintiffs, minor heirs of *Udulunnissa*, and on behalf of *Fakirunnissa*, mother and guardian of *Mahomed Hossein*, her minor son. By this, a 2-annas share of the 9 annas of the talook was sold for Rs.6,235 to *Bhuput Jha*, *Sardhari Jha*, *Madhuri Jha*, and *Ramdat Jha*, described as the shareholding proprietors and inhabitants of the talook *Wari*. And it was stated that the Rs.6,235 was for liquidating the debts due to *Babu Gopal Das & Bunsi Lal*, mahajuns. One anna was said to be purchased by *Bhuput Jha* and one by the other three. The books of the firm of *Gopal Das & Bunsi Lal* were produced. They contained accounts in the name of *Mussummat Wasimunnissa*, the grandmother of the Plaintiffs, who appeared to be possessed of considerable property, but had no interest in the talook *Wari*. From various entries in these accounts they appeared to relate to this talook as well as to the property and transactions of *Wasimunnissa*. In the account for the year 1269 (1861–62),

under the native date corresponding with the 16th of May, 1862, is the following entry:—

	R.	A.	P.
"The 3rd Jeyt Budi. Received on account of the consideration money of two annas of talook *Wari* debited to *Bhuput Jha*, *Sardhari Jha*, *Madhuri Jha*, and *Ramdat Jha* .	6,325	0	0
"Deduct on account of the share of *Fakirunnissa*, which is debited to her . . .	3,117	8	0
"Remainder	Rs.3,117	8	0

On the other side of the account, under a date corresponding with the 13th of January, among the entries of "paid on account of revenue into Collectorate," there is an entry "*Wari*, Rs.181. 9," and under a date corresponding with the 29th of March an entry "*Wari* of Raja, Rs.447. 15.," and on the date corresponding with the 26th of May, 1862, there is an entry, "Paid through *Sheik Velait Hossein*, in order to defray the expenses of the settlement of talook *Wari* Rs.2,500." It appears from the proceedings of the Collector of *Tirhoot*, dated the 19th of May, 1862, in a suit for obtaining permanent settlement of talook *Wari*, that a petition was filed on behalf of *Bhuput Jha* and *Madhuri Jha*, stating that they were the purchasers of A.1. 3. 11 cowris and a fraction share, and subsequently on the 10th of May, 1862, a petition of withdrawal was filed on their behalf, stating that they withdrew from that claim filed previously, and praying that the deed of sale to them on the 19th of December, 1856, might be considered ineffective, and that the settlement might be effected with *Fakirunnissa* and others. And that subsequently, on the 12th of May, 1862, another petition was filed on their behalf with the deed of the 7th of May, 1862, praying that a settlement of the 2-annas share mentioned in that deed should be made with them. On the same 7th of May, 1862, consent decrees were made in the five pre-emption suits by which they were dismissed. Thus all opposition on the part of the *Jhas* as regards seven annas was withdrawn, and they claimed the settlement of only two annas under their new title. In the end the settlement was

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made with *Fakirunnissa*, described as mother and guardian of *Mahomed Hossein*, and *Reazuddin* described as father and guardian of the Plaintiffs, for seven annas of the nine, and with the *Jhas* for the remaining two annas. The allegation in the plaint that *Reazuddin* appropriated the consideration for the sale of the 7th of May, 1862, was not only not proved, but was disproved, and nearly the whole, if not the whole, of the consideration appeared to have been applied on account of the talook.

The Subordinate Judge held that the deed of the 7th of May, 1862, was valid, saying in his judgment that the pre-emption suits and the Defendants' claim case before the Collector were "impending dangers over *Wari* at that time, and what might have been the consequence of those objections cannot be now determined at this distance of time, and he should therefore think that *Reazuddin* acted wisely in making a compromise with the Defendants by executing the disputed kobala so soon as only eleven months after the death of *Udulunnissa*, and thereby to avert that danger." He dismissed the suit. The High Court set his decree aside, and made a decree for the Plaintiffs, being, they said, "on the whole of opinion that the Respondents (the Defendants) failed to establish that any benefit was conferred upon the Appellants by the sale by their father of the disputed property." The statement in the deed, and in the petition to the Collector on the 12th of May, 1862, of *Reazuddin* and *Fakirunnissa*, asking that a settlement of the 2-annas share should be made with the *Jhas*, that the sale was for the purpose of liquidating debts due to the mahajuns, is not correct, though, looking at *Gopal Das's* account and the large payment made by his bank on account of *Wari* three weeks afterwards, the parties may have thought that it was correct; but at all events their Lordships think it does not preclude the Defendants from proving the real nature of the transaction, and that it was a beneficial one to the minors.

It is not a case of a sale by a guardian of immovable property of his ward, the title to which was not disputed, in which case a guardian is not at liberty to sell except under certain circumstancees. *Macnaghten*, Principles of Muhammadan Law, ch. 8, cl. 14. The right of *Udulunnissa* and *Fakirunnissa* to be

purchasers of the nine annas was disputed. By the sale of the two annas the dispute was put an end to and thus a settlement obtained of the seven annas. Moreover, the Rs.6,235 appeared to be a fair price for the two annas which had in December, 1856, been sold by *Sufdar Hossein* for Rs.2,250.

Their Lordships differ from the opinion of the High Court that the present Appellants, who were then Respondents, had failed to establish that any benefit was conferred upon the minors by the sale. They are of a contrary opinion, and, looking at the whole transaction, they think it was within the power of the guardians to make the sale.

There is another ground upon which the Appellants are entitled to have the decree of the High Court reversed, and the decree of the Subordinate Judge dismissing the suit affirmed.

The case stated in the plaint is that *Reazuddin* had sold to the Defendants one anna out of four-and-a-half annas, the property left by *Udulunnissa* in talook *Wari*, and the Plaintiffs only got three-and-a-half annas partitioned to them by the Collector. Now *Reazuddin*, as the husband of *Udulunnissa*, was entitled to one-fourth share of her property, and consequently the Plaintiffs were in possession of more than they were entitled to by inheritance, their shares amounting to $3\frac{3}{8}$ annas. This objection was taken in the written statement of the *Jha* Defendants. It was attempted to be met by some loose evidence of *Reazuddin* being liable for dower and relinquishing his share to the Plaintiffs on that account. No document was produced, and the Subordinate Judge found as a fact that *Reazuddin* did not relinquish his one-fourth share. Their Lordships are of opinion, upon the evidence, that this finding was proper, and that the reason given by the High Court for not agreeing in it is insufficient. An admission of *Reazuddin* that he had relinqished his share, even if it was clearly made in the deed of sale, ought not to affect the other Defendants. He had been ordered to attend as a witness and did not do so, and the Subordinate Judge thought he was in collusion with the Plaintiffs. This was highly probable, and the suit appears to their Lordships to be a dishonest attempt to get back property for which the Plaintiffs had received full consideration and had had the benefit of it.

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Their Lordships, will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to the High Court, with costs, and to affirm the decree of the Subordinate Judge.

The Respondents will pay the costs of this appeal.

Solicitors for Appellants: *Barrow & Rogers.*

Reported also I.L.R. 6 Cal. 749

J. C.* 1889

Feb. 20.

MUHAMMAD YUSUF KHAN . . . . . DEFENDANT;

AND

ABDUL RAHMAN KHAN . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Procedure—Sect. 622, *Civil Procedure Code—Power of Revision.*

Sect. 622, Civil Procedure Code, does not authorize the Court acting thereunder to order that a final judgment of a competent Court from which no appeal is allowed by law should be set aside.

Where such order has been made, and subsequently discharged, a further application to restore it is incompetent as being a second application for review.

Cited I.L.R. (1 All.) App. 155 Dig. I.L.R. 20 Cal. 10 I.L.R. 24 Cal. 802, 18 Cal. 275

APPEAL by special leave from an order of the Judicial Commissioner of *Oudh* (June 22, 1886).

The suit was brought in the Court of the Subordinate Judge of *Lucknow* to cancel a document which was alleged to have been granted by the Plaintiff to the Defendant, on the ground that it was a forgery. The Subordinate found that the document was genuine, and dismissed the suit. On appeal to the District Judge of *Lucknow*, he also found the document to be genuine, and confirmed the original decree. In his judgment, however, he stated that two words "have the appearance of being added to the Defendant's document." No appeal lay against these concurrent judgments to the Judicial Commissioner, who, however, consented to revise the proceedings of the District Judge under sect. 622 of the Civil Procedure Code, and then on the 10th of November, 1884, reversed the decree granting the Plaintiff the

Referred to I.L.R. 13 All. 536 — 17 Mad. 417.

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relief sought for. His ground for doing so was, that as the District Judge had found that two words had been added to the disputed document, this threw upon the Defendant the burthen of shewing when they had been added, and as he had offered no evidence upon the point, it was the duty of the District Judge to assume that they had been added after execution, and therefore that he should have cancelled the document. This Judicial Commissioner, Mr. *Young*, left the Court shortly after this decision, and his successor, Mr. *Tracy*, reversed his decision on review, being of opinion that the error of the District Judge, assuming him to have been in error, did not come within the terms of sect. 622. Fifteen months after this judgment Mr. *Young* resumed charge of the Court, and an application was made to him by the Plaintiff to reverse Mr. *Tracy's* proceedings. Mr. *Young* was of opinion that those proceedings could neither be revised by him under sect. 622, nor reviewed under sect. 629, but he considered that Mr. *Tracy's* order "was passed *per incuriam*, and was one which the Court would not have made if it had been duly informed." He therefore cancelled it, under what he considered to be an inherent power possessed by the Court, and restored his own original order under sect. 622.

The Judicial Commissioner based his final order upon the following considerations. He was of opinion that the Privy Council ruling in the case of *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh* (1), on which Mr. *Tracy* had relied as interpreting sect. 622, was not known in *India* in November, 1884, and the interpretation of sect. 622 which then prevailed in *India* was undoubtedly that which was followed by him in his judgment of November, 1884, so that Mr. *Tracy's* order of April, 1885, was an order giving retrospective effect to a subsequent interpretation of the law, and was clearly wrong; that the Court had power *ex mero motu* to rectify an error apparent on the face of the order, and so, following the decisions of their Lordships of the Privy Council in the cases of *Syud Tafazzul Hossein Khan* v. *Raghunath Prasad* (2), and of *Rajunder Narain Rae* v. *Bijai Govind Singh* (3), the Judicial Commissioner ruled that Mr. *Tracy's* order

(1) Law Rep. 11 Ind. Ap. 237. (2) 7 Beng. L. R. 186.
(3) 2 Moore's Ind. Ap. Ca. 181.

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was passed *per incuriam*, and one which the Court would not have made if it had been duly informed, and the order of the 10th of November, 1884, was restored.

Mayne, for the Appellant.

C. W. Arathoon, for the Respondent.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

In this case on the 10th of November, 1884, Mr. *Young*, the Judicial Commissioner of *Oudh*, set aside the judgment of a competent Court, which by law was final, and without appeal. In so doing he proceeded on an erroneous interpretation which had been placed on sect. 622 of the Civil Procedure Code by the Court of *Allahabad*, and in ignorance of the fact that the error had been corrected by a judgment of this Board in the case of *Rajah Amir Hassan Khan* v. *Sheo Buksh Singh* (1), to which Her Majesty gave effect by her order of the 26th of June, 1884. The order of Mr. *Young* was brought before Mr. *Tracy*, who happened at the time to be officiating as Judicial Commissioner in his place. On the 23rd of February, 1885, Mr. *Tracy*, having regard to the decision of the Privy Council, discharged the order of Mr. *Young*. Fifteen months afterwards the matter was again brought before Mr. *Young* on an application purporting to be made under sect. 622. That application was incompetent as being a second application for review, and it would have been out of time if it had been regular in other respects.

On the 22nd of June, 1886, Mr. *Young* discharged the order of Mr. *Tracy* on the singular ground that it was made *per incuriam*, and that it was an order which the Court would not have made if it had been duly informed. From that order of Mr. *Young* special leave to appeal to Her Majesty has been granted.

Mr. *Arathoon*, who appeared for the Respondent, admitted that he could not contend that Mr. *Young* had any jurisdiction to pronounce the order of the 22nd of June, 1886, but he argued

(1) Law Rep. 11 Ind. Ap. 237.

that Mr. *Tracy's* order was wrong, and that Mr. *Young's* first order was right.

Their Lordships, however, are of opinion that Mr. *Tracy* was perfectly right in discharging the first order of Mr. *Young*; and that neither of Mr. *Young's* orders can be supported upon any ground whatever.

Their Lordships, therefore, are of opinion that the order of the 22nd of June, 1886, ought to be reversed, and the order of the 23rd of February, 1885, affirmed, and that the Respondent should pay the costs of the proceedings before Mr. *Young*, in which the order of the 22nd of June, 1886, was made. They will, therefore, humbly advise Her Majesty accordingly; and the Respondent must pay the costs of this appeal.

Solicitors for Appellant: *Young, Jackson, & Beard.*
Solicitors for Respondent: *T. L. Wilson & Co.*

MAHABIR PERSHAD SINGH AND ANOTHER PLAINTIFFS;

AND

MACNAGHTEN AND ANOTHER . . . . DEFENDANTS.

J. C.* 1889 *Feb.* 12, 13, 16.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Procedure—Omission to plead—Res Judicata—Code of Civil Procedure, 1882, *s.* 13—*Mortgagor and Mortgagee—Sale—Leave to bid.*

In a suit by the Respondents upon a mortgage bond the Appellants set up that by a specific agreement they were entitled to set off rents due by the Respondents as tenants against the mortgage debt, and alleged an intention to sue separately for these rents. On failure to prove the alleged agreement the Respondents obtained a decree without any deduction for rents.

The Appellants subsequently obtained decrees for rents, and the Respondents at a sale in execution of their decree on the mortgage purchased the mortgaged estate after obtaining leave to bid.

Thereafter in a suit by the Appellants to set aside these sales, and to have the mortgage debt extinguished by setting it off against rents, they relied upon an equity in their favour to have an account and a set-off of rents against the mortgage debt:—

Held, that this equity should have been pleaded in defence to the mort-

* *Present:*—LORD WATSON, LORD HOBHOUSE, and SIR RICHARD COUCH.

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gage suit, and did not avail for the purpose of annulling the judicial sales. Under sect. 13 of the Code of Civil Procedure of 1882 the plea being one which ought to have been made a defence to the former suit, the Appellants were now barred from insisting on it.

Held, further, that leave to bid puts an end to the disability of a mortgagee and puts him in the same position as any independent purchaser, and consequently that the Respondents did not purchase as trustees for the Appellants.

APPEAL from a decree of the High Court (Feb. 12, 1886), affirming a decree of the District Judge of *Tirhoot* (May 8, 1884).

The Appellants had been proprietors and mortgagors by simple mortgage to the Respondents of certain mouzahs, which the Respondents had caused to be judicially sold in execution of a decree obtained by them, as mortgagees, against the mortgagors, and had themselves purchased at the sales by the Court, and the object of the suit was to be let in to redeem the mortgaged properties, notwithstanding those sales.

The Courts below dismissed the suit, holding that the claim of the Appellants to redeem had been concluded by a decision of the Subordinate Judge of *Mozufferpore* in former litigation between the parties and under the circumstances which are sufficiently set forth in the judgment of their Lordships.

The material part of the judgment of the High Court was as follows:—

"The only ground of appeal is this, that, as on the dates of sale a large amount of money was due from the Defendants to the Plaintiffs, and as the Defendants were the mortgagees, the sale should be declared as null and void, and that an account should be taken between the Plaintiffs and the Defendants of the moneys due to each other; and if on taking such account anything be found due to the Plaintiffs, they should be allowed to sell the mortgaged property for the realization of the same.

"The Plaintiffs allege, that the amount of money which was receivable by them from the Defendants falls into two classes. First, the rents of the disputed property which the Defendants had in their hands, having been collected by them for the Plaintiffs after possession was taken of the property in dispute in accordance with the decree of the High Court, dated the 31st of

January, 1871. Second, the rents due under the ticca pottahs executed in June, 1874.

"Now we find that in the suit which was brought by the Defendants upon the bond dated the 9th of October, 1871, the Plaintiffs, who were the Defendants in it, set up in their written statement that the Plaintiffs in that suit were not entitled to recover the amounts sued for unless an account were taken of the two classes of money due to them, referred to above. In that written statement they based their defence upon this point upon an *express* contract between the parties.

"In the opinion of the Court of first instance as well as of this Court, which heard the case in regular appeal, this *express* contract was not established.

"As regards the *first* class, this Court found that on an adjustment of accounts between the parties, which took place on the 31st of December, 1873, the Plaintiffs in this case were found still indebted, to the extent of the money for which the bond of the 9th of October, 1871, was executed. Therefore, as regards this amount, it is no longer open to the Plaintiffs to contend that anything was due to them from the Defendants. The learned Advocate-General contended, that although the express contract upon which the Plaintiffs relied in the former litigation, was not established in the opinion of the Courts which dealt with it, yet the Plaintiffs are not precluded from relying upon the equity which arises upon the establishment of the fact that on the dates of the respective sales the Defendants were indebted to the Plaintiffs on account of the rents due upon the leases executed in June, 1874. He further argued that this equity was not pleaded and dealt with by the Court in the former litigation."

"We desire to guard ourselves from being understood to say that, in our opinion, any such equity as is put forward by the learned Advocate-General on behalf of the Plaintiffs, does really exist, having regard to the facts stated in the plaint. But conceding this point in favour of the Plaintiffs, it seems to us that the result of the former litigation precludes them from relying upon it. The suit upon the bond dated the 9th of October, 1871, was brought to recover the money due under it by the *sale* of the mortgaged premises. In that suit the equity in question, if it

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really existed, would have been a valid defence. Therefore the decree which was passed in favour of the Plaintiffs directing *the sale* of the mortgaged premises, precludes the Plaintiffs from setting it up again in a subsequent litigation.

Doyne, for the Appellants, contended that they were not concluded by previous decisions from shewing that at the time of the sale in execution the Respondents were largely indebted to the Appellants in respect of collections and rents. Being so indebted it was inequitable that they should sell and buy and hold the mortgaged lands without coming to an account. The decision in the former suit related to a right of set-off under a written agreement. The present contention is founded on an equity resulting from the relation between the parties, an equity to have an account of moneys received to their use, and to have a set-off in respect thereof. That equity has never been satisfied, and is available to the Appellants until satisfied. Moreover the Respondents must be held to have purchased as trustees for the Appellants under the circumstances, notwithstanding that they had obtained leave to bid. Reference was made to Act IV. of 1882, s. 99, and *S. M. Kamini Debi* v. *Ramlochar Sircar* (1).

Cowie, Q.C., and *C. W. Arathoon*, for the Respondents, were not heard.

1889 *Feb.* 16.

The judgment of their Lordships was delivered by

LORD WATSON:—

In order to trace the circumstances which have given rise to the present litigation, it is necessary to go back to the year 1867; and it will be convenient, for the sake of brevity, to use the terms "Appellants" and "Respondents," as including not only the parties to this appeal but their predecessors in interest. The Appellants, members of a joint Hindu family, were owners of certain shares of twenty mouzahs, in talooks *Malikalipore* and *Jonapore*, which were sold, in that year, for arrears of Government revenue, to one *Bunwari Lal*. An action was brought by them

(1) 5 Beng. L. R. 450, 460.

to set aside the sale as irregular, which was dismissed in the District Court; but in January, 1871, the High Court gave their decision in favour of the Appellants, which was affirmed by this Board in December, 1873.(1)

The Respondents held six of these mouzahs in lease before the sale to *Bunwari Lal*. They were proprietors of an indigo factory in the neighbourhood, and they gave the Appellants pecuniary and other assistance in their suit, in consideration of which the Appellants, in October, 1871, during the dependence of *Bunwari Lal's* appeal to the Privy Council, executed a mortgage bond, by which they hypothecated their interest in the twenty mouzahs to the Respondents for Rs.25,000, with interest at 1 per cent. per mensem, payable in one lump sum by the month of April, 1875. The Appellants were restored to possession in April, 1871, after the judgment of the High Court in their favour. In September, 1873, the parties entered into an agreement by which, in consideration of further assistance already given and to be given them by the Respondents, the Appellants undertook, in the event of *Bunwari Lal's* appeal proving unsuccessful, to renew the lease of the six mouzahs, to let to the Respondents the remaining fourteen mouzahs under a ticca pottah for fifteen years, and to grant them a mokurruri lease of 13½ bighas, required by them for the extension of their factory. In February, 1874, shortly after the dismissal of *Bunwari Lal's* appeal, the Appellants executed a sunnud, authorizing the Respondents to collect the rents of their mouzahs for the year ending in September, 1874, the Respondents accounting to them for their receipts, under deduction of costs and charges. In July, 1874, the Appellants, in terms of their previous agreement, renewed the lease of the six mouzahs, at a rent of Rs.645, for fifteen years from September, 1874, and granted the Respondents a ticca pottah, for the same period, of the remaining fourteen mouzahs, at a yearly rent of Rs.3527, subject to future adjustment. They also gave, as stipulated, a mokurruri lease of the 13½ bighas.

These transactions between the Appellants and Respondents, which were by no means complicated, have unfortunately been the occasion of numerous and protracted litigations. The Respondents began the strife, in June, 1877, by bringing a suit

(1) L.R. 1 Ind. App. 89 (S.C. 12 B.L.R. 297)

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upon their mortgage bond. At that date, they undoubtedly owed to the Appellants a considerable sum, for past rents of the twenty mouzahs, no part of which had been paid. The Appellants did not plead in defence to the suit that, in the circumstances already explained, they were entitled to have a general account taken, and the Respondents' decree limited to the balance in their favour. They alleged that there had been a specific agreement (which they failed to prove) to the effect that the rents should be set off against the mortgage debt; and they also stated that it was their intention to institute a separate action for recovery of these rents. The result was, that, on their failure to establish the alleged agreement, the Subordinate Judge, in January, 1878, gave the Respondents a decree, without any deduction on account of rents, which was affirmed by the High Court on the 22nd of May, 1879. The Respondents, in April, 1878, sued for execution on the decree of the Subordinate Judge; but, in consequence of its being appealed to the High Court, proceedings were stayed. The next step was taken by the Appellants, who, in June, 1878, raised two actions, one for the rents due in respect of the six and the other for the rents due in respect of the fourteen mouzahs. In the former of these actions they obtained a decree, and the latter was dismissed by the Subordinate Judge in April, 1879, on the ground that the rent payable for the fourteen mouzahs had never been adjusted in terms of the lease; but the High Court, holding that it lay with the Respondents to shew what, if any, abatement ought to be made from the rent specified, on the 2nd of April, 1881, reversed his decision, and gave the Appellants a decree for the amount of their claim, which was upwards of Rs.15,000.

The judgment of the High Court in their mortgage suit having then become final, the Respondents, in June, 1879, revived the execution proceedings which they had instituted in April, 1878. The mortgaged property was exposed for sale on the 15th of September and the 20th of November, 1879, when it was purchased in two lots by the Respondents, who had obtained leave to bid from the Court, for Rs.17,000. The regularity of the sale was impeached by the Appellants, but their objections were overruled by the Subordinate Judge, and after being

sustained in part by the High Court, were ultimately disallowed by this Board on the 24th of December, 1882 (1).

Having thus failed to make good their statutory objections, the Appellants, on the 24th of November, 1883, filed their plaint in the present suit, which prays to have the two judicial sales of the 15th of September and the 20th of November, 1879, set aside or treated as nullities, to have the mortgage debt extinguished by setting against it the rents which had already accrued or might afterwards accrue, and for khas possession of the mortgaged property after the expiry of the Respondents' leases in 1889. The prayer was based upon two grounds. The first, which attributed the sales to undue influence and oppressive conduct on the part of the Respondents, was abandoned in the High Court, and was not insisted on here. The second consists in an alleged equity, arising out of the relations of the parties to each other in the years 1871 to 1874, and the transactions between them during that period, to have an account taken, and to have the rents payable by the Respondents credited against the sums due by the Appellants under the mortgage bond. Their Lordships are disposed to think that the circumstances upon which the Appellants rely did raise such an equity in their favour. The mortgage bond, the agreement, followed by the granting of the leases therein stipulated, and the sunnud, were all parts of one complex transaction, the objects of which were to enable the Appellants to recover their property from *Bunwari Lal*, and to secure to the Respondents repayment of moneys which they had advanced, as well as remuneration for services rendered. But, assuming the existence of the equity, the real question in the present appeal is, whether it could be enforced by the Appellants, in November, 1883, to the effect of annulling the judicial sales of 1879.

Their Lordships entertain no doubt that the proper occasion for enforcing the equity now pleaded would have been in defence to the mortgage suit of 1877. That was certainly the suit in which any account to which the Appellants were entitled, as in a question with their mortgagees, ought to have been taken. But the Appellants not only abstained from putting forward any claim to a general accounting; they declared in their pleadings

(1) L. R. 10 Ind. App. 25 (S. C.) I. L. R. 9 All. 653 (S. C.) 11 Cal. L. R. 494

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their intention of bringing a separate action for recovery of the rents, a proceeding which would have been wholly unnecessary if the plea which they urge in this appeal had been put forward and given effect to. The plea is within the meaning of sect. 13 of the Civil Procedure Code of 1882, a matter which ought to have been made ground of defence in a former suit between the same parties, and the Appellants are therefore barred from insisting on it, *exceptione rei judicatæ*.

It was argued by Mr. *Doyne*, upon the authority of a decision by *Macpherson*, J., reported 5 Beng. L. R. 450, that the Respondents must be held to have purchased as trustees for the Appellants. The same argument, which is not raised in the pleadings, seems to have been addressed to the High Court, who, in their judgment, distinguish between that case and the present, on the ground that, in the former, the mortgagee did not purchase the mortgaged property, but the mortgagor's equity of redemption. Their Lordships cannot regard that explanation as satisfactory. It appears to them to be probable that, in the case referred to, the mortgagee had not obtained leave from the Court to purchase. The report does not state that he had; and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. If the decision of *Macpherson*, J., proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchase of the mortgaged property.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The Appellants must bear the costs of the appeal.

Solicitors for Appellants: *T. L. Wilson & Co.*
Solicitor for Respondents: *S. G. Stevens.*

Reported also 16 Cal 758

SRIMATI HEMANGINI DASI . . . . PLAINTIFF;

AND

KEDAR NATH KUDU CHOWDHRY. . . . DEFENDANT.

J. C.*
1889
Feb. 23, 27;
April 3.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Maintenance—Right of Widows after Partition amongst the Sons —Shares of Step-sons not chargeable with Maintenance.

Where there are several groups of sons of a deceased Hindu by different mothers, the maintenance of the mothers must so long as the estate remains joint be a charge upon the whole estate. But when a partition has been made each mother is entitled to maintenance against the share allotted to her own son or sons, and has no claim against the shares of her step-sons.

Reported in 16 Cal 33

13 Cal 336

APPEAL from a judgment of the High Court and the decree made thereon (July 29, 1886) modifying a decree of the second Subordinate Judge of *Hooghly* (April 11, 1885). The facts are stated in the judgment of their Lordships. The report of the case in the Court below will be found in Ind. L. R. 13 Calc. 336. The question raised in this appeal was whether the effect of a partition between the Plaintiff's step-son and step-grandchildren on the one side, and her own and only son on the other, by which the last takes a separate third share, is or not by Hindu law to discharge the step-children's two-third shares from the Plaintiff's previously existing claim for maintenance, and to limit it to the share of her own son, both in matter of amount and security.

Referred to I.L.R. 19 All. 328

The Subordinate Judge referred to the case relied on by the Respondent of *Jeeomony Dossee* v. *Atmaram Ghose* (1), where a question is stated to have been raised as to whether a mother (not a party to the suit) of an only son was entitled on partition between her son and her step-sons to a separate share, and it was "understood and determined" that she was not so entitled, but must look to her son for maintenance. He was of opinion that, as the mother in question in that case was not a party to that

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

(1) Cited at page 64 of Sir F. Macnaghten's "Considerations on Hindu Law."

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suit, there could have been no decision, or more than an *obiter dictum*, as to her right to a share, and that the question as to her right to maintenance never properly arose in her absence.

The High Court held, "that up to the time of the decree for partition defining the separate shares of the members of the family, the Plaintiff would be entitled to claim her maintenance against the whole estate, and subsequent thereto against the share allotted to her son," but that, as after the separation in February, 1883, the Plaintiff had received her maintenance from her own son alone, she could therefore have no claim for it against her step-sons, with "the result therefore that so far as her step-sons are concerned this suit must fail."

The reasons of the High Court for arriving at that conclusion on a question which the learned Judges stated to "be one almost of the first impression, there being no distinct text in the Hindu law books, nor any distinct authority on the matter," are as follow:—

"The parties to the suit are governed by the *Bengal* school of law, and we have to determine what, under the law as it is administered in *Bengal*, the true rights of the Plaintiff are in respect to the maintenance claimed by her.

"The rights of a Hindu widow, as a widow, arise out of the marriage; and upon the death of her husband, in the event of there being no sons, she succeeds under particular texts to the estate left by her husband. Where the husband leaves a son or sons, all that she is entitled to is maintenance out of the estate. When, during the lifetime of her husband, there is a partition of the family property, she gets, if she is sonless, but not if she has a son (and in which case alone her son is entitled to a share), an equal share with the sons of her husband; but where there is no such partition during the lifetime of her husband, what she is entitled to get, when the estate, upon her husband's death, passes to the sons, whether she has a son or sons born of her or not, is only maintenance out of the estate.

"And when the Hindu law prescribes a share being allotted to a woman after her husband's death upon a partition amongst her sons, it is a share which is given to her simply in lieu of maintenance, and not because she is a coparcener in the estate, or

that she has any pre-existing rights; and the share which is thus given to her, reverts, upon her death, to those heirs of her husband out of whose portion the said share was taken.

"(See *Shama Churn's* Vyavastha Darpana, ed. 1883, pp. 487, 488, 521, 522, and the authorities quoted therein; *Strange*, Hindu Law, ed. 1830, vol. ii., p. 307, and *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1).)

"The question that arises is, what may be her rights upon a partition taking place after her husband's death between the sons. In the case of many sons of one individual by different mothers, where the number of sons is equal, the partition, according to certain texts, may be made by them by allotment of shares to the mothers; that is to say, there being no difference in the sons' shares, each of the mothers takes a share for her sons. If, however, the sons are unequal in number, then a division with reference to their mothers cannot be made, and in that event, the partition is made with reference to the number of sons themselves. (See Dàyàbhaga, ch. iii., sect. 1., v. 12 and 13; Vyavastha Darpana, pp. 461–463, and the texts quoted therein.) When the partition is made between the different groups of sons born of different mothers, their mothers, whether they be their own mothers or step-mothers, get no share whatsoever, and this is, according to certain authorities, upon the principle that they are not the natural mothers of all the sons. (See Vyavastha Darpana, 518, and the authorities cited therein, and *Col.* Dig., vol. 3, pp. 98–102.) When, subsequently, each group of sons come to a partition among themselves, it is then that their respective mothers get a share; but a mother having no son or only one son, gets no share at all, but simply maintenance. If, however, at the time of partition with half brothers, the uterine brothers also come to a partition amongst themselves, their mother would be entitled to a share out of her own sons' shares. (See Vyavastha Darpana, pp. 518 and 519; Dàyàbhaga, ch. iii., sec. 2, v. 29 and 30; *Jeeomony Dossee* v. *Atmaram Ghose* and *Seebchunder Bose* v. *Gooroopersaud Bose* (2).)

"In the case of the number of sons by different mothers being

(1) 9 Suth. W. R. 62.

(2) Sir Francis Macnaghten's Considerations on Hindu Law, pp. 64–72.

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equal, the partition, as already observed, may take place with reference to the mothers, the principle evidently being that each of the mothers and her sons become, by the separation and partition, the members of a distinct and separate family, holding, as it were, in common the share which is allotted to them; likewise in the case of a partition where the number of sons is unequal, and where the separation is between the several groups of sons, each of the groups becomes one joint family; and their mothers become members of their respective families, and continue to be so until there is a separation and partition among her sons. This seems to be almost the universal practice in *Bengal*; and no instance, as far as we are aware, has occurred where, notwithstanding such a separation and partition, a mother has claimed her maintenance against her step-sons. Having become a member of her own sons' family, she would naturally look to her sons, and not to her step-sons, for her maintenance; and indeed that was practically the view that was thrown out by Sir *Francis Macnaghten* in the year 1824 (see pp. 42, 43, and 59 of his book; as also *Strange*, Hindu Law, vol. ii., pp. 291 and 309). And this seems to be but consistent with the Hindu law, for in the event of a partition taking place amongst her own sons, she gets a share out of her sons' shares, and not out of her step-sons' shares. In this view of the matter, the mother can only claim maintenance in her sons' family, whether she has only one son, or more sons than one; the only difference being that, in the latter case, upon a partition amongst the sons, she gets a share in lieu of her maintenance, whereas in the former case, there being no partition possible, she cannot possibly get a share, but must be content with a maintenance. In the case of *Joymoni Dasi*, already referred to, it will be found, upon an examination thereof, that upon a partition between *Luckapria's* son, *Attaram*, and his three half-brothers, it was understood and admitted, and it was accordingly declared, that his mother *Luckapria* was not entitled to any separate property, but that she was to look to her son for her maintenance. It is, indeed, true that *Luckapria* was at the time of the suit not subject to the jurisdiction of the Supreme Court which dealt with the case, and as such the above declaration was not binding upon her; but we do not refer to

the said declaration as a precedent in this case, but simply as shewing what, so late back as in December, 1823, was fully understood to be the true position of a mother situate as the present Plaintiff is.

"So long as there is no partition between the several groups of sons, a mother has indeed the security of the whole estate left by her husband for her maintenance; and this is just and proper, because so long as the estate remains joint, she is not in a position to predicate which particular share of the family property is to be charged for her maintenance, but the moment such a partition takes place, she is in a position to predicate it, because the share which is eventually to come to her in lieu of maintenance, when such a share does come to her by the act of her own sons, is to come out of her sons' share of the family property; so that it is but consistent with reason, equity, and justice, that upon the partition taking place, her maintenance is to attach to that share of the estate which is allotted to her sons. By the separation and partition, she becomes a member of her sons' family, and it would not seem to be reasonable that she should be allowed to claim maintenance against another family of which her step-sons become members, and indeed if she could claim such a right, the partition itself would be but an imperfect one.

"It was argued before us, that the same principle which governs the rights of a sonless widow, ought to govern the case of a widow who may have a son or sons; that is to say, whereas a sonless widow gets no share, but only maintenance, which is to come out of the whole estate, so in the case of a mother having a son or sons, a decree should be made charging the whole estate, or charging any particular portion of the estate, which may be adequate for her maintenance. But it appears to us, that the case of a sonless step-mother is very different indeed from the case of a mother having a son or sons, because upon a separation and partition taking place, the step-mother does not become the member of any particular family, but that she continues, as it were, a member of all the families into which the original family is divided; and she is therefore not in a position to predicate which particular share of the family property ought to provide for her maintenance. In the present case, it seems clear that the Plain-

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tiff, upon a separation and partition between her son and step-sons, does become, and has in fact become, as substantially found by the Subordinate Judge, a member of her son's family, and she is in a position to a predicate which of the shares of the family property, determined by the partition, ought to provide for her support."

Having so limited the Plaintiff's claims, the High Court held that out of her son's share of the estate, yielding an income of Rs.23,333, Rs.150 per mensem would be a suitable allowance for her, and decreeing her that amount against her son's share, dismissed with costs of both Courts the Plaintiff's suit against the Respondent.

Doyne, and *Mayne*, for the Appellant, contended that the judgment of the High Court was wrong. It is not the effect of partition according to Hindu law to cut down the claim of a widow with one son so as to make her right to maintenance a charge on that son's share alone, and its amount proportionate to the value of that share, in lieu of its being a charge on the whole estate of her husband, share and share alike with the other widows. Suppose a widow be childless, she has a charge on the whole estate not affected by any partition. If she has sons, but no step-sons, she lives with them so long as they agree, and is entitled to a share equal to that allotted to a son on partition. If, on the other hand, in a case supposed, she has two sons and three step-sons, she is entitled not to one-third of two-fifths, but to one-seventh. There is no arbitrary change to be made in the widow's position as a consequence of a partition which she can neither bring about nor prevent. Reference was made to *Strange's* Hindu Law (ed. 1830), vol. ii., p. 307; *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1); *Sreemutty Nittokissoree Dossee* v. *Jogendro Nauth Mullick* (2); Dàyàbhaga, sect. 2, §§ 31, 29, 30; Sir *F. Macnaghten's* Considerations on Hindu Law, p. 66; *Strange's* Hindu Law, vol. i., p. 171. [LORD HOBHOUSE referred to 2 *Strange*, 291.] Her claim to maintenance is a charge on the whole estate of her husband. It is paramount to the sons' rights to partition and must be provided for prior to partition taking place. It

(1) 9 Suth. W. R. 62. (2) Law Rep. 5 Ind. Ap. 55, 56.

is not a right depending on the sons' means or held at their pleasure; see pp. 203, 205. Reference was also made to 2 *Strange*, 354, notes by *W. Ellis*, and *Colebrook* and *Sutherland*; *Sorolah Dossee* v. *Bhobunmohun Neoghy* (1); 1 *Strange*, 191, 166, c. 8; 2 *Strange*, 352; *West* and *Buhler* (last ed.), p 791; Dàyàbhaga, ch. 3, sect. 1, v. 12. There is no authority for saying that a mother of one son takes a share of that son's share. Her right is to maintenance, of which a share equal to that of a son is the measure, and her right attaches to the whole estate.

Cowie, Q.C., and *Branson*, for the Respondent, contended that the Appellant after partition of the estate of her husband was entitled to have her maintenance from the share of her son, and not from that of her step-son. Upon partition she became a member of the family of her own son, and ceased to belong to the family of her step-son, or to be entitled to maintenance from him or from his share of the estate. Reference was made to *Jaganatha's* Digest, vol. iii., bk. v., c. 2, art. 89. In his commentary, he refers to the Dàyàbhaga. Then Sir *F. Macnaghten*, p. 39 of his Considerations, follows in 1824, citing cases decided in 1809, 1811, and 1813; see also p. 48, a case decided in 1819; see also pp. 51, 60, 66, 75. Reference was made to *Callychurn Mullick* v. *Janoon Dossee* (2).

Doyne replied.

1889
April 3.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Appellant is the widow of *Tara Churn Kundu*, who died on the 19th of April, 1865. He left one son, *Hurrish Chunder*, by the Appellant, and two sons, *Kedar Nath* (the Respondent) and *Annoda Pershad*, by another wife, who died before him. *Annoda Pershad* died in June, 1882, leaving a will by which *Kedar Nath* was appointed executor of his estate. The suit was brought on the 13th of September, 1884, by the Appellant, against *Kedar Nath* in his own right and as executor to the estate of *Annoda Pershad*, and against *Hurrish Chunder*, and the plaint

(1) Ind. L. R. 15 Calc. 292. (2) Indian Jurist (N.S.) vol. i. p. 284, 287.

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prayed to have it held that the Plaintiff was entitled to get Rs.500 a month from the properties left by her husband, for the expenses of her religious acts and her maintenance, and that the Rs.500 a month might be declared to be a charge upon the whole of his estate. It also prayed for a decree for Rs.3016. 9. 3. 1. 1 krant, on account of maintenance for the past six months and one day. After the institution of the suit, and before the filing, on the 6th December, 1884, of a written statement by *Kedar Nath*, *Hurrish Chunder*, who attained his majority on the 3rd of November, 1882, instituted two suits against *Kedar Nath* and others, members of another branch of the family who were co-sharers with *Tara Churn* in different properties, for a partition of the joint family property. This was stated in the written statement of *Kedar Nath*, and it was pleaded that if the Plaintiff was entitled to any maintenance her claim to it would lie against her son, to be paid out of his share of the joint property which would be allotted to him after partition. On the 20th of February, 1886, decrees for partition were made in those suits. The judgment of the High Court on appeal from the Subordinate Judge was given on the 29th of July, 1886, and they held, contrary to the decision of the Subordinate Judge, that subsequently to the decree for partition the Plaintiff was entitled to maintenance only against the share allotted to her son; and as to the claim for past maintenance, which was for the period since the family had separated in food and worship, she having been maintained in the family of her son could not claim maintenance from her step-sons or their shares, though her son might possibly claim contribution. Accordingly they dismissed the suit as against *Kedar Nath*.

The decision as to the arrears has not been questioned before their Lordships, and they entertain no doubt that the High Court was right in taking into consideration the decree for partition. The main question is one upon which there is no distinct text in the Hindu law books. So long as the estate left by *Tara Churn* remained joint and undivided the Plaintiff was no doubt entitled to claim her maintenance out of the whole estate. Does that right continue to exist after partition, or is there substituted for it a right to maintenance out of

her son's share? According to the Dàyàbhaga, ch. 3, sect. 1, vs. 12, 13, where there are many sons of one man by different mothers, but equal in number and alike by class, partition may be made by the allotment of shares to the mothers, and while the mother lives the sons have not power to make a partition among themselves without her consent. In this case the mother seems to take on behalf of her sons. It would seem to follow that, after such a partition, a mother's right to maintenance would be out of the share she took, and not out of shares taken by the other mothers.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of or by way of provision for the maintenance for which the partitioned estate is already bound, and thus it is material to see in what way she takes a share. According to *Jaganatha* it is a settled rule that a widow shall receive from sons who were born of her an equal share with them, and she cannot receive a share from the children of another wife; therefore she can only receive her share from her own sons. *Col.* Dig. book 5, ch. 2, v. 89; 3rd ed., vol. 2, p. 255. In Sir *F. Macnaghten's* Considerations on Hindu Law, p. 62, a case in the Supreme Court of *Sree Mootee Jeeomony Dossee* v. *Atmaram Ghose* is reported, which was a suit for partition, where a man died leaving two widows and three sons by one, and one son, *Atmaram*, by *Luchapriah* the other; and it is said that it was understood and admitted that *Luchapriah* was not entitled to any separate property upon a partition made between her only son and his three half brothers, and that she was to look to him for her maintenance.

The Subordinate Judge, in his judgment, said the question who was to give the maintenance never properly arose in that suit in the absence of *Luchapriah*, and if any such question was then decided it was an *obiter dictum*. The question did arise between *Atmaram* and his half brothers, and if the contention of the present Appellant that the maintenance is a charge upon the estate and to be taken into account in making the partition is right, the Court should have provided for it. The case appears to be a direct authority upon the question in this appeal. Then there is a case reported at p. 75 where a man had three sons by

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his first wife, two by his second, and two by his third, and all survived him. In a suit for partition it was declared, in accordance with the authority in *Col.* Dig. before noticed, that the first wife was entitled to one fourth of the three seven parts of her sons, and the second wife to one third of the two seven parts of her sons. Nothing is said as to the third wife, one of whose sons had died, and she was his heir.

The argument addressed to their Lordships for the Appellant was that the maintenance is a charge on the estate, and like debts must be provided for previous to partition. But the analogy is not complete. The right of a widow to maintenance is founded on relationship, and differs from debts. On the death of the husband his heirs take the whole estate, and if a mother on a partition among her sons takes a share, it is taken in lieu of maintenance. Where there are several groups of sons, the maintenance of their mother must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal. The Appellant will pay the costs of it.

Solicitors for the Appellant: *T. L. Wilson & Co.*
Solicitors for the Respondent: *Barrow & Rogers.*

Reported also 12 R 16 Cal 753

LACHMAN SINGH . . . . . DEFENDANT;

AND

MUSSUMMAT PUNA AND ANOTHER . . . PLAINTIFFS.

J. C.*
1889
Feb. 22.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

Code of Civil Procedure of 1882, ss. 584, 585—*Jurisdiction in Second Appeal—Secondary Evidence.*

Under sects. 584 and 585 of the Code of Civil Procedure, 1882, a second appeal is not permitted upon a question of fact. The only questions in this case which the Judicial Commissioner in *Oudh* in second appeal, and therefore their Lordships in further appeal, could try were (1) whether a case arose for admitting secondary evidence; (2) whether the evidence adduced was really secondary evidence, both which were decided in the affirmative.

Held, that a copy of a deed filed in another suit and still in the records of the Court, indorsed "copy in accordance with the original," signed by the Judge who alone was authorized to compare and accept a copy, is admissible secondary evidence.

APPEAL from a decree of the Judicial Commissioners (Feb. 13, 1886).

The facts are stated in the judgment of their Lordships.

Doyne, and *C. W. Arathoon*, for the Appellants.

The Respondents did not appear.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The sole question raised in this appeal is a question of fact, whether *Kalli Baboo* made a gift of his estate to *Ramchandra*, under whom the Respondents claim. If there was no such deed of gift the title of the Appellant is a good one, but if there was, then the Respondents, being the heirs of *Ramchandra*, are entitled to the decree which they have got.

The question has been before three Courts, and they have all

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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decided in favour of the gift. They have held that it is proved by a deed of which secondary evidence was given.

The case is not only within the general rule which this Committee observe, that they will not, unless under very exceptional circumstances, disturb a finding of fact in which the Courts below have concurred, but it is within the more stringent rule laid down by the Code of Civil Procedure. The third Court was the Judicial Commissioner, and to him the appeal was what is called in the Code a second appeal. Sect. 585 of the Code of 1882 says,—"No second appeal shall lie except on the grounds mentioned in sect. 584." Those grounds are, "the decision being contrary to some specified law or usage having the force of law," or "the decision having failed to determine some material issue of law or usage having the force of law," or for substantial defect in procedure. It is not alleged here that there is any defect of procedure. Therefore in order that this appeal may succeed there must be some violation of law.

This Committee is sitting on appeal from the order of the Judicial Commissioner, and it can only do what the Judicial Commissioner himself could have done. No special leave to appeal from the decree of the Commissioner has been applied for, and their Lordships find that they are bound by his findings of the facts. Therefore the only questions here are, first, whether a case arose for admitting secondary evidence, which was a proper question of law; and secondly, whether the evidence that was admitted was really and truly secondary evidence.

With regard to the case for admitting secondary evidence, their Lordships refer to the Evidence Act of 1872. It says,—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases." Two of the cases are,—"When the original is shewn, or appears to be in the possession or power of the person against whom the document is sought to be proved," and "When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

In this case there is evidence of two witnesses, of whom certainly one, and probably both, assisted at what they call a

ceremony, in which *Kalli Baboo* made over the property to *Ramchandra*, and told the people present, the villagers, the ryots or cultivators, that *Ramchandra* was the malik. There is the evidence of one witness that he was present at the signing of a deed, which he says was stated to be a deed of gift from *Kalli Baboo* to *Ramchandra*, and there is the evidence of another witness that *Kalli Baboo* told him that there had been such a deed of gift. Whether that evidence would of itself prove the deed of gift need not now be discussed, but that it formed good ground for holding that there was a deed capable of being proved by secondary evidence, cannot be doubted. The Courts below have found that all the documents belonging to the estate passed into the hands of the Appellant, and therefore that the deed in question is in his power, or has been destroyed or lost.

Then what is the secondary evidence which is let in? It is a copy of a deed which was filed in another suit and is still on the records of the Court. That deed is indorsed "Copy in accordance with the original," and it is signed by the Judge presiding in the Court. Their Lordships accept the opinion of the Judicial Commissioner upon the value of that copy. His words are these:—"There can be no doubt that the Judge, in the course of the suit in 1864, did accept and file, with the proceedings, a copy of a deed of gift by *Kalli Baboo*, and the only question is whether that copy had been compared with the original, when the copy is enfaced, in accordance with practice, 'Copy according to the original,' and the Judge's order to file is also found on it. I cannot doubt that the copy was duly compared. Except the Judge, there was no person who was authorized to compare and accept a copy, and his signature to the order must, it seems to me, guarantee the genuineness of the copy." Their Lordships entirely concur with that opinion. When the copy is looked at it establishes the deed of gift on which the Respondents rely.

There was another question raised with respect to some goods and chattels—some moveable property. It was said that the Appellant, having been in possession of the estate rightfully under a deed of gift from *Ramchandra's* widow, was entitled to the income during that time, and the Judicial Commissioner has to a certain extent given effect to that contention by adjudicating

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to the Appellant the ownership of some villages which it appears that during that period he purchased out of the surplus or savings from the income. But besides the land he received a certain quantity of chattels which we may call stock and plant, and it is now contended that, as the original stock and plant must have worn out, and the Appellant was not under any obligation to replace it, therefore that which he has in fact brought in to replace it belongs to him and not to the estate. So far as there is stock and plant belonging to the three villages which the Judicial Commissioner has adjudicated to the Appellant, that he takes. But with regard to the other property which forms part of the estate which is adjudicated to the Respondents, their Lordships think that the Appellant is in the position of an ordinary tenant for life who enjoys furniture and plant which wears out from time to time, and which he replaces, and that that which is found attached to the property which the Respondents receive must follow the title to that property, and that the decree of the Judicial Commissioner is right in not giving to the Appellant any more stock or plant than belongs to the three villages which he has given to him.

The result is that the appeal fails in every respect, and their Lordships, therefore, must humbly recommend Her Majesty to dismiss it. There will be no costs, as the Respondents do not appear.

Solicitors for the Appellants: *T. L. Wilson & Co.*

SYED LUTF ALI KHAN . . . . . PLAINTIFF;

AND

FUTTEH BAHADOOR AND OTHERS . . . DEFENDANTS.

J. C.*
1889
Feb. 20, 21, 22;
April 6.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mortgagor and Mortgagee—Rights of Purchaser of mortgaged Property—Equities of Mortgagor.

In a suit for possession by the certificated purchaser of one-third of certain mouzahs which had been sold in execution of a decree obtained by the mortgagee against the Defendant as mortgagor; it appeared that the Defendant had in a previous execution sale at the instance of a second mortgagee of the same property, bought the same subject to his own first mortgage.

The High Court held that the Plaintiff should be treated not as a purchaser, but as a mortgagee in respect of his purchase-money. They then directed that only so much of the original mortgage debt as should be apportioned against the share bought by the Plaintiff should be realized in his favour:—

Held, that this ruling and direction were founded on a misapprehension; that the purchaser had a right to possession of the property which he had bought, and that the Defendant had no equity to prevent it.

APPEAL from a decree of the High Court (June 12, 1885), modifying a decree of the Subordinate Judge of *Patna* (Nov. 24, 1883).

The plaint prayed, under the circumstances stated, that the Plaintiff's right to possession as purchaser under the "prior lien" should be declared and possession decreed to him, and that he should have registration of his name in the Collector's office.

Or, if the Court should be of opinion that he was not entitled to possession without giving the Defendants Nos. 3, 4, 5, and 6 interested in the second mortgage, an opportunity of redeeming the prior mortgage, that it should be declared and decreed that the Plaintiff was entitled to receive from them the sum of Rs.36,000, which he had paid for the share of *Jugdispore*, &c., with interest from the date of payment to that of repayment.

Or, if the Court should be of opinion that the Plaintiff was not

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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entitled to recover that amount from the Defendants 3, 4, 5, and 6, that then his right to recover it from Defendant No. 2, *i.e.*, *Velait Ali*, should be declared.

The material part of the judgment of the High Court is as follows :—

"It appears, then, that this property was mortgaged first to *Syed Velait Ali Khan*. It was mortgaged, secondly, to *Juggernath Singh*. Suits were brought upon both mortgages. A decree was obtained and sale effected in the first place under the second mortgage, and the property sold became vested ultimately in, or in the name of, *Ram Padaruth Upadhia*. The property was then sold under the decree obtained upon the first mortgage, and purchased by the Plaintiff. Now, the Court below has held that the Plaintiff is not entitled to recover possession from the Defendant *Ram Padaruth*, but that he is entitled to recover from that Defendant the amount of the purchase-money which he, the Plaintiff, paid upon the purchase of this property. Against that decision this appeal has been brought. The contention in support of the appeal, shortly stated, is this:—It is said that the effect of the Plaintiff's purchase under the decree in the suit upon the first mortgage, was to give him certain rights in the property, and in particular the right of enforcing the mortgage lien which the decree-holder, the mortgagee, had upon the property, and no other lien. We think that this contention is well founded, and that after his purchase his right was to enforce the mortgage lien. On the other hand, the right of the purchaser under the decree in the suit on the second mortgage was a right to redeem.

"It is argued, therefore, that the decree that has been given cannot be supported; and we think this is so as the decree stands. But, on the other hand, it is pointed out that in the Court below there was a contention that the property sold under the decree on the second mortgage vested in *Ram Padaruth* as a mere benamdar for the first defendant, *Futteh Bahadoor*, the original mortgagor. The Subordinate Judge in the Court below has found against that. In that we are unable to agree. We accept what he says with regard to the unsatisfactory character of the witnesses who spoke about the matter. But that evidence stands unrebutted, and we think it ought not to be rejected. If

it was not true, *Ram Padaruth* was the man most interested in denying it, and he is a party. But *Ram Padaruth* did not venture to come into the witness-box to say that this was really a purchase by him on his own account, and not on account of his master, *Futteh Bahadoor*. We are, therefore, unable to agree with the Court below in that finding. We hold that *Ram Padaruth* was a benamdar for *Futteh Bahadoor*.

"Then it is said that, that being so, a decree against this property in the hand of this man, a mere benamdar for the original mortgagor, may properly be made. We think it is not open to the Respondent to come forward and ask for a decree other than the decree made by the Court below. But we think he is entitled to dispute the finding on the question of benami in order to sustain the decision of the Court below, that a decree might properly be made against the property; and we think also that when the appellant complains that a wrong decree has been given, the Respondent is entitled to be heard as to how that decree is to be modified.

"Then the question is, what should be the decree? We think that a decree should be given giving the Plaintiff in this case the benefit of that to which he is entitled, namely, his mortgage lien. The first mortgage covers ten parcels of property; and the second mortgage covers two out of those ten parcels. The original mortgagees seem to have no interest left in either property; and the person who has acquired title under the first mortgage is the Plaintiff. He is before the Court. The persons entitled under the second mortgage are also before the Court. And so is the mortgagor. Therefore all the persons interested in the matter are before the Court. There is authority (see the two cases, one in 11 Calc. L. R. 565, and other in 13 Calc. L. R. 272) for saying that in a suit like the present, where all parties are before the Court, an inquiry may be made as to how the benefit and the burden of the mortgage debt should be distributed among various persons interested in the various properties originally affected by the mortgages. The claim for relief in the plaint is not very clear. But we think it is sufficient to cover the relief which we propose to given. We think, therefore, that we may direct an inquiry as to how much of the mortgage is properly

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chargeable upon that portion of the property which forms the subject-matter of this second appeal before us, and direct that so much of the mortgage debt may be realized by the sale of that property."

Doyne, Q.C., and *C. W. Arathoon*, for the Appellant, contended that the High Court should have held that he having purchased the one-third share of *Jugdispore*, in an execution sale at the instance of the mortgagee, acquired by his purchase all the mortgagor's right, title and interest therein existing at the date of the mortgage. Consequently he was entitled to possession as against a purchaser with notice at a sale in execution of a decree obtained upon the subsequent mortgage. The Respondent had not obtained by his purchase at the sale by the second mortgagee any right as against the Appellant to retain possession or to redeem. That would have been perfectly clear if the second mortgage had never existed, and neither the second mortgage nor what was done under it gave him any new equity. Reference was made to *Shaik Abdulla Saiba* v. *Haji Abdullah* (1); *S.B. Shringapure* v. *S.B. Pethe* (2); *Rajnarain Singh* v. *Sheera Mean* (3); *Brojo Kishoree Dossia* v. *Mahomed Suleem* (4); *Muthora Nath Pal* v. *Chundermoney Dabia* (5); *Syud Emam Momtazuddeen Mahomed* v. *Rajcoomar Doss* (6); *Venkata Somayazulu* v. *Kannam Dhora* (7); *Ganesh Lal Tewari* v. *Shamnarain* (8).

The Respondents did not appear.

1889 *April* 6.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Respondent *Futteh Bahadoor* was the proprietor of two-thirds of a revenue free estate, consisting of mouzah *Jugdispore* and other mouzahs and dependencies, of which he had inherited one-half and had purchased the other half. He was also the proprietor of the whole of a revenue paying estate called *Ranipore*.

(1) Ind. L. R. 5 Bomb. 8, 12.
(2) Ind. L. R. 2 Bomb. 662.
(3) 7 Suth. W. R. 67.
(4) 10 Suth. W. R. 151.
(5) Ind. L. R. 4 Calc. 817.
(6) 14 Beng. L. R. 408.
(7) Ind. L. R. 5 Mad. 184.
(8) Ind. L. R. 6 Calc. 217.

On the 14th of July, 1875, he executed a mortgage bond in the usual form, by which, after stating that he had borrowed Rs.35,000 on interest from *Haji Nawab Syed Velait Ali Khan* (the second Respondent) stipulating to pay interest at 1 rupee per cent. per mensem and mortgaging, pledging, and hypothecating the shares of the mouzahs specified below owned and possessed by him, he declared that in case of non-payment of the principal on the completion of two years, or within that period, *Velait Ali Khan* should be at liberty to realize the principal with interest by instituting a suit and obtaining a decree, and executing the same till the realization of the whole of the decretal amount from the property mortgaged in the bond, and in case of its not being sufficient, from other immovable properties and from his person. The mouzahs specified below were *Ranipore* one-third share, *Jugdispore* one-third share, and one-third share of seven other mouzahs. On the 18th of December, 1877, *Futteh Bahadoor* executed a similar mortgage of another one-third share of *Ranipore* and of the same one-third of *Jugdispore* to *Juggernath Singh* (the 3rd Respondent), and another person named *Baijnath Singh*, to secure repayment in one year of Rs.7,000, with interest at 3 per cent. per mensem.

In 1878 *Velait Ali Khan* sued *Futteh Bahadoor* for Rs.47,964. 7. 1. 12, principal and interest due on his mortgage. On the 20th of December, 1878, *Futteh Bahadoor* filed a petition stating that Rs.4,645. 3. 2. 8 had been remitted by the Plaintiff out of the money claimed, on condition that the petitioner should pay the whole of the principal amount, with costs, and interest at the rate of 1 rupee per cent., on the 20th of December, 1879, and praying that according to this admission of claim the case might be decreed in favour of the Plaintiff, allowing the mortgage of the property to stand. And on the same day the Court made a decree in accordance with this agreement. Default having been made in payment of the money, *Velait Ali Khan* in 1880 took proceedings for execution of the decree, and, on the 9th of April, 1880, the Court issued an order for attachment of the right and interest of the judgment debtor, "comprising" the one-third of *Ranipore* and one-third of *Jugdispore* "mortgaged in the bond and decree." The other mouzahs are not mentioned, and it does

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not appear that anything has been done in respect of them. The attachment was made on the 20th of May, 1880. In the meantime *Jugul Kishwar*, who seems to have taken the place of *Baijath Singh*, and *Juggernath Singh*, had, on the 2nd of April, 1879, obtained a decree against *Futteh Bahadoor* on the second mortgage bond, in execution of which, on the 13th of July, 1880, an order was issued to attach one-third "the right and interest of the debtor" out of the entire of mouzah *Jugdispore*, &c., and one-third "the right and interest of the debtor" in mouzah *Ranipore*. The attachment of *Jugdispore* was made on the 6th, and of *Ranipore* on the 10th of August, 1880.

The 22nd of November, 1880, was appointed for the sale in both executions. On that day *Futteh Bahadoor* petitioned that both sales should be postponed. In the case of *Velait Ali Khan* the sale was postponed until the 15th of January, 1881. In the case of *Juggernath Singh* no order was made, and the sale was held on the 22nd of November. The notification of sale stated that the property to be sold was mortgaged in 1875 to *Velait Ali Khan*. One *Gunga Pershad*, who was at that time in the service of *Juggernath Singh*, bid Rs.9, one or two other persons having offered less, and there being no higher bid he was declared the purchaser. On the 19th of February, 1881, *Gunga Pershad* executed a deed of sale of what he had purchased to *Ram Padaruth* for Rs.100, and on the 21st of February he presented a petition to the Court praying that, in lieu of his own name, the name of *Ram Padaruth* might be entered, and the sale certificate granted and possession delivered to him. Accordingly, on the 24th of February, it was ordered that possession should be delivered to *Ram Padaruth*, the certificate auction purchaser. This was done in the usual form on the 3rd of March; but there never was any actual change of possession, *Futteh Bahadoor* remaining in possession all the time.

According to the evidence of *Gunga Pershad*, *Futteh Bahadoor* was the real purchaser, *Ram Padaruth's* name being used by him. The First Court considered that *Ram Padaruth* must be held to be the real purchaser, but the High Court, on the appeal, did not agree in this, and held that *Ram Padaruth* was a benamdar for *Futteh Bahadoor*. Their Lordships agree in this with the High

Court, which properly remarked that *Ram Padaruth* had not ventured to come into the witness box to say that it was really a purchase by him on his own account.

The sale in execution of *Velait Ali Khan's* decree, which decree it has been stated was made by consent upon his agreeing to relinquish part of his claim and give time for payment of the remainder, took place on the 15th of January, 1881. At that sale the Appellant became the purchaser of the share of *Ranipore* for Rs.12,000, and of the share of *Jugdispore*, &c., for Rs.36,000; the sum to be realized by the execution being Rs.61,265. 6 pies, and there was consequently not sufficient to satisfy the sum due on mortgage by upwards of Rs.13,000. The sale was confirmed by an order dated the 28th of March, 1881, and on the 12th of September, 1881, the bailiff of the court was ordered to put the Appellant, being the certificated auction purchaser, in possession of the properties. On the 25th of October, 1881, the nazir reported that he had given formal possession, but the Appellant was unable to obtain actual possession, and on the 9th of October, 1882, he instituted the present suit, and claimed a decree for possession of the share of *Jugdispore*, &c., or, if that was not granted, a decree for Rs.36,000, and interest thereon, to be recovered from the disputed property. He also claimed a similar decree in respect of the share of *Ranipore*, but there is no question in this appeal about that property, he having obtained a decree for possession of it.

The Subordinate Judge, acting on his finding that *Ram Padaruth* was the purchaser, ordered that if he did not pay Rs.36,000, with interest up to the 3rd of April, 1884, the Plaintiff should have power to put up to sale the third share of *Jugdispore*, &c., for the realization of that amount, and also that it might be recovered from his person and property. *Ram Padaruth* appealed to the High Court, which held that the decree could not be made against him, a mere benamdar for the original mortgagor, and that a decree should be made, giving the Plaintiff "the benefit of that to which he is entitled, namely, his mortgage lien," and they directed an inquiry as to how much of the mortgage was properly chargeable upon that portion of the property which formed the subject of that appeal, and directed that so

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much of the mortgage debt might be realized by the sale of that property.

This direction and the inquiry upon which it is consequent seem to be founded on some misapprehension. The High Court treat the Appellant as mortgagee in respect of his purchase, and at the same time refuse to give him a charge for the full amount of his purchase-money. As between the Appellant and the other parties to the suit there can be no ground for apportioning the original mortgage debt in the manner proposed.

A question of general importance, on the law relating to Indian mortgages, and one on which the Courts in *India* are not altogether agreed, was raised by the learned counsel for the Appellant in the course of his argument. Their Lordships, however, do not think it necessary to go into any general question. In their view the decision of the present case must depend on its own special and peculiar circumstances.

Upon the facts which have been stated, they are of opinion that it would be contrary to equity to allow *Futteh Bahadoor* to set up against the title of the Appellant any right to possession as acquired by his purchase from *Gunga Pershad*. The sale to the Appellant was in the execution of a decree which was made to give effect to a compromise between the mortgagor and the mortgagee. He undoubtedly acquired by his purchase a right to possession against the mortgagor, and the mortgagor ought not to be allowed to defeat that by having purchased the interest which was sold in execution of the decree upon the second mortgage.

The High Court, instead of varying the decree of the Lower Court in the manner it has done, should, in their Lordships' opinion, have varied it by decreeing possession of the share of *Jugdispore*, &c., as there described, in the same manner as possession of the share of *Ranipore* is decreed, with the like order as to mesne profits and costs.

Their Lordships will humbly advise Her Majesty to order the decree of the High Court to be varied accordingly. The Respondent *Futteh Bahadoor* will pay the costs of the appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*

Reported also 17 Cal 3.

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AND CROSS APPEAL.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Succession to Shebaitship—Heirs of the Founder—Title by Primogeniture.

According to Hindu law, when the worship of a Thakoor has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or that there has been some usage, course of dealing, or circumstances to shew a different mode of devolution:—

Held, in this case, that the Plaintiff, as representative by primogeniture of the founder of the Bullav Acharjee community, was entitled, in preference to a cadet of the same family, to the shebaitship of a certain consecrated picture or idol, and as incident thereto to the things which have been offered to the idol.

It appearing that a temple had been granted to the idol on condition that the Defendant should be shebait: *held*, that the Plaintiff could not recover possession of such temple, though it had been in part created after the grant by the subscription of the worshippers, no evidence having been given that the subscribers did not know of the condition, or had paid their money with any reference to the question of shebaitship.

APPEAL and cross-appeal from a decree of the High Court (Jan. 9, 1885).

The suit was brought by the Plaintiff for the recovery from the Defendants of a temple, a portrait, and various articles of moveable property contained in the said temple. He alleged that, as the High Priest of the Bullav sect of Vishnuvites, he was entitled to the physical and material possession of all property dedicated to the worship of the Divinity by members of the said sect. At the trial this general claim of right was abandoned, and was limited to a similar claim in respect of such property dedicated by the subdivision of the sect to which he belonged. This claim, so limited, was negatived by the original

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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Court, and by the successive Appellate Courts, and was not before their Lordships a matter in dispute. The original Court dismissed the suit with costs. On appeal to the Division Court, composed of *Garth*, C.J., and *Wilson*, J., both Judges agreed that the claim founded on custom was not made out, but held that the Plaintiff had a claim to possession and management of the particular temple and its property, as being its founder. *Wilson*, J., however, was of opinion that the whole suit was barred by limitation. The Chief Justice disagreed with him on this point, but as the finding of *Wilson*, J., was based on an approval of the findings of the original Court on matters of fact, the original decree was confirmed. An appeal was then preferred to a bench consisting of *Mitter*, *Pigot*, and *Norris*, JJ. *Pigot*, J., agreed throughout with the original Court. He was of opinion that the Plaintiff had no claim as founder of the institution, and he considered that if he had any claim it was barred by limitation. *Mitter* and *Norris*, JJ., agreed with the lower Appellate Court in maintaining the Plaintiff's title as founder, and considered that the bar of limitation applied to the temple and the land on which it was built, but not to the portrait and the moveable property connected with it. The result was that they gave the Plaintiff a decree for so much of his claim as was not barred by lapse of time, and dismissed his suit as to the rest.

Both parties appealed against this decree. The Plaintiff, because he did not recover all that he claimed. The Defendant, because the Plaintiff was allowed to recover anything.

Cowie, Q.C., and *Doyne* (*Branson* with them), for the Appellant, contended that it was proved by the evidence that the worship of the portrait in question was established by *Dowjee*, and that he thereby became the proprietor and controller of that worship. Consequently he was entitled to be the "custodian and trustee of any property dedicated to that worship by his own disciples." It was proved, moreover, as a matter of usage, that such right descended to the founder's heirs in succession, and consequently to the Appellant and Respondent. There was no evidence of abandonment of this right. On the contrary the Respondent was proved to have appointed certain Mookheas, that is, offici-

ating priests. Originally there was a gift of property to the two idols, and the appointment of a shebait. Then as to the temple and the land on which it stands; the temple was shewn to have been built entirely by the subscriptions of the votaries of *Dowjee*, and the land was given by *Munnee Bibi* to *Dowjee*. No adverse possession of the portrait and its worship and valuables by the first Defendant had been proved. Then as regards the appointment of *Purslestan Das* as shebait of *Dowjee* that was *ultra vires* and void. He never took possession. With reference to the subscriptions, they were paid and collected on the footing that the title to the land was in the Appellant with notice thereof to all whom it might concern.

Mayne, for the Respondent and cross-Appellant, contended in answer to the Appellant that he had failed to establish his title. The Courts have all found that the dedicated property was not vested in the high priests. A restricted custom was set up under which it was said that a certain class of temple, of which the *Calcutta* temple was one, is subordinate to the central establishment at *Nath Dwar*, and that the Plaintiff, as high priest of *Nath Dwar*, was entitled to the subordinate temples and all the property connected with them. That custom was not made out by the evidence. Then, as regards the rule of Hindu law, that unless the contrary be shewn the right to the shebaitship is in the heirs of the founder of the worship, it was contended that this was not correct, and that a distinction must be taken between the founder of a worship and the founder of an institution in which that worship is carried on. Reference was made to *Greedharee Doss* v. *Nundokissore Doss* (1); *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (2); *Srimati Janoki Debi* v. *Sri Gopal Acharjia* (3); *Genda Puri* v. *Chhatar Puri* (4). Putting usage aside, where property is given as an endowment, the holders take the property not as managers but as trustees: see *Macnaghten's* H. L. Prec. p. 102; *Elder Widow of Raja Chuttur Sein* v. *Younger Widow* (5). The proposition is not correct that if a

(1) 11 Moore's Ind. Ap. Ca. 428.
(2) Law Rep. 1 Ind. Ap. 228.
(3) Law Rep. 10 Ind. Ap. 97.
(4) Law Rep. 13 Ind. Ap. 105.
(5) 1 Sel. Rep. 180 (new ed. 239).

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man starts the worship of an idol and dedicates property thereto the dedicated property is vested in him. Similarly if a man gives a portrait to be worshipped and subscribed to he does not remain the proprietor thereof and entitled to regulate its worship and prescribe the rules relating thereto. Hindu law on this subject relates to where property has been given to an idol, in which case it must be vested in some person as trustee for that idol. There is no authority for saying that if a founder of a worship gives he retains any rights of management over the thing given. There is no evidence that *Dowjee* ever founded any institution of which, according to Hindu law, he and his successors would be proprietors and managers. Nor is there any evidence that *Dowjee* ever consecrated his portrait, or that his doing so would give him a right to the management of any institution in which it was worshipped. As to limitation of the suit, see Act XV. of 1877, art. 49; *Gooroo Das Pyne* v. *Ram Narain Sahoo* (1).

Cowie, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this suit the Plaintiff, who is Appellant in the first appeal, claims to be the rightful shebait of a consecrated picture or idol, to which peculiar sanctity is attached by the Bullav Acharjee sect or community of Vishnuvites; and as incident thereto he claims the things which have been offered to the idol, and the possession of a temple in *Calcutta* in which the idol has for some years been located. His claim is disputed by *Poorooshottum* the principal Defendant, whose son and representative is the Appellant in the cross appeal. The controversy, as usual in such cases, has ranged over a wide field, and has given occasion to a great amount of difference in judicial opinion. But their Lordships think that the matters of fact on which the decision should be rested are either undisputed or proved beyond reasonable doubt; and that when they have been ascertained the legal conclusions are plain enough.

(1) Law Rep. 11 Ind. Ap. 59.

The Plaintiff is the representative by primogeniture of the founder of the Bullav Acharjee community. *Poorooshottum* is a cadet of the same family. All the male members of the family are in their lifetime esteemed by their community as partaking of the Divine essence, and as entitled to veneration and worship; but the head of the family has the precedence, and is styled the Tickut. The Plaintiff is the present Tickut. His principal seat, apparently the principal seat of the community, was *Sree Nath Dwar* in *Oodeypore*, but in the year 1876 he was expelled from thence, for some cause not now appearing in evidence.

The Plaintiff's grandfather was named *Dowjee*, who was Tickut in his day. In the year 1825 he paid a visit to *Calcutta* and presented to his disciples there a consecrated portrait of himself, which has ever since been worshipped, and which is now the subject of contention. It is known as the Thakoor *Dowjee*, is one of the very numerous presentments of *Krishna*, and is shewn by the evidence to attract many worshippers. *Dowjee* the mortal died in the year 1826, and he is worshipped in many places through other consecrated portraits, or images of some kind. But thenceforward for many years the connection of the Tickut, or of any of the chiefs of his family, with the worship of the Thakoor in *Calcutta* is very obscure.

We learn from the evidence that for some time prior to 1860 one *Tikumjee* was mookhea, or ordinary officiating priest. On his death, apparently in 1860 or 1861, his brother *Govindram* entered on the duties of that post, which he held till his death in 1877. Then after a short interregnum, *Sewloll*, the son of *Govindram*, was appointed, and he apparently holds the post still. By whom these two persons were appointed, and whose servants they were, are matters of controversy.

In the year 1865, *Poorooshottum*, who is described as an inhabitant of *Mothoora*, and whose principal place of worship was at *Patna*, came to *Calcutta*, with which place he had no previous connection. He appears to have been invited there by *Govindram*, who in *Patna* had been his disciple. He then took a prominent part in the worship of the Thakoor *Dowjee*, as indeed by his family and spiritual position he was entitled to do.

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In the next year arrangements were made for the worship of the Thakoor either on a grander scale or in a more decorous fashion. Before that time he was placed in a house in *Shama Bye's Lane*, which had then fallen into disrepair. An old and devout lady, named *Munnee Bibi*, was then moved to provide a better habitation for him. She was a disciple of *Poorooshottum*, and to him she addressed a deed of gift conveying a new house to *Dowjee* and to her family Thakoor *Beharyjee*, who is another presentment of *Krishna*.

The deed bears date the 30th of August, 1866, and the material passages are as follows:—

"To the auspicious lotus feet of the most worshipful *Sreeloo Sreejoot Poorooshottumjee Moharaj*, inhabitant of *Mothoora*."

She then described a house in *Hanspookur Street*, and continued:—

"I by this orpunnamah make debutter and give to *Sree Sree Issur Beharyjee* and *Sree Sree Issur Damoojee*, Thakoors; the aforesaid *Sree Sree Issur Beharyjee* and *Sree Sree Issur Damoojee*, Thakurs, shall be located in the said house; you and your heirs whoever shall be here shall absolutely have charge of the property, the subject of this gift, and perform all necessary sheva or worship, &c., of the *Sree Sree Issur Jeeoos*, without having any concern with me or my heirs; you shall engage *Sreejoot Gobind Mookhea* as long as he shall live, poojaree to carry on the sheva of the *Sree Sree Issur Jeeoos;* upon the death of the said *Gobind Mookhea* you shall have absolute power to appoint any one poojaree during the existence of this orpunnamah granted by me.

"Should I or any heirs, or any other gossamee of the *Bullav* family set up any claim to the said house or land, or to the said sheva or worship of the *Sree Sree Issur Jeeoos* the same shall be void and inadmissible. By this orpunnamah, I merely give the said house and land and sheva (interview) to you and your heirs; you or any of your heirs shall have no power at any future time to sell this house and land. It simply remains for the location of the *Sree Sree Issur Jeeoos*."

The Thakoors *Dowjee* and *Beharyjee* were removed to the house so granted, and in the course of a few years *Dowjee's* worshippers

desired still further to exalt his worship by building a new temple on the site of the house. A large sum of money, about Rs.16,000, was collected for that purpose; the temple was built, other accommodation being got for the Thakoors in the meantime; and in the year 1878 they were brought back and installed in the temple. There they remained up to the final decree of the High Court in this suit. There are also some other Thakoors, all presentments of *Krishna*, in the temple, but it is clear from the evidence that the principal object of worship is *Dowjee*.

In the month of February, 1881, the Plaintiff for the first time visited *Calcutta*. He was received with great ceremony by a large number of Vishnuvite worshippers, and was taken to the temple on the following day, when he performed the solemn, apparently the most solemn, ceremony of Arutty. *Sewloll*, who was mookhea, paid him great veneration, and for the next three months regularly brought to him part of the proshad or offerings made to *Dowjee*. On the 24th of April the Plaintiff went to the temple and inspected the valuables belonging to *Dowjee*, which were produced to him by *Sewloll*. The Plaintiff ordered that a list of the articles should be made, and he caused some of them, and also the money in hand, to be locked up, and the keys to be given to *Sookloll*, who describes himself as having been the Plaintiff's jemadar for eight years in *Oodeypore* and for sixteen years in *Calcutta*.

The Plaintiff then demanded of *Sewloll* an account of the money received by him while in charge. It is not very clear what was said or done upon this demand, except that no accounts were rendered, and that soon afterwards quarrels broke out, which culminated on the 19th of May in a riot. The Plaintiff's people were then forcibly turned out of the temple. On the 16th of September the Plaintiff brought this suit.

The case was heard in the first instance before Mr. Justice *Cunningham*, then on appeal by a Division Court, consisting of Mr. Justice *Wilson* and Chief Justice *Garth*, and on further appeal by a full bench consisting of Mr. Justice *Pigot*, Mr. Justice *Mitter*, and Mr. Justice *Norris*. The two last-named learned Judges agreed in opinion that the Plaintiff is entitled to succeed in his claim to the portrait and the valuables, but must fail in his

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claim to the temple. To that effect therefore, is the decree of the High Court, from which both parties appeal.

Their Lordships will first address themselves to the Plaintiff's claim to the portrait. The principal points taken in the elaborate argument of Mr. *Mayne*, who is counsel for *Poorooshottum* and his heir, may be briefly summarised as follows: Neither by general law nor by special custom is it shewn that the shebaitship descends to the heirs of the founder; there is no document or trustworthy evidence to shew that, between the mortal *Dowjee's* visit in 1825 and the Plaintiff's in 1881, such heirs ever intervened in the affairs of the Thakoor *Dowjee*. The reception given to the Plaintiff in 1881 was no more than was due to his great position and sacred character, which all admit. It is true that *Poorooshottum* did not appoint *Govindram* or *Sewloll;* but the Thakoor *Dowjee* was given by the mortal *Dowjee* to the community of worshippers; it was their business to tend the Thakoor and to appoint mookheas; and the evidence shews that a committee of them did appoint *Sewloll*. Finally, the suit is not a suit on behalf of *Dowjee* the Thakoor, but a personal claim by the Plaintiff to moveable chattels, and is barred under art. 49 of the *Limitation Act* of 1877.

According to Hindu law, when the worship of a thakoor has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to shew a different mode of devolution. This principle is illustrated by the decision in the case of *Peet Koonwur* v. *Chutter Dharee Singh* (1), and in the present case some of the learned Judges of the High Court have affirmed it, while none has expressed dissent from it. One learned Judge thought that the principle does not apply to this case, because *Dowjee* was not the founder of the *Calcutta* worship. But their Lordships adopt the view of the other Judges, and holding that the mortal *Dowjee* was the founder they must also hold that the Plaintiff is by general law the shebait of that worship.

There is no proof of any usage or course of procedure at variance with this presumption in favour of the Plaintiff. The

(1) 13 Suth. W. R. 396.

only circumstance bearing against him on this point is the non-appearance of intervention on the part of his family. So far as the oral evidence goes, it is to the effect that the custom of the Bullav Acharjee community is in accordance with the general rule, and is quite sufficient to satisfy the requirements of the case.

With respect to intervention by the Plaintiff, there is no evidence that the Plaintiff appointed *Govindram* as he alleges, and though it is clear that *Poorooshottum* did not appoint that mookhea, it cannot be assumed that the Plaintiff did so. But, to begin with the later part of the history, their Lordships consider that the reception given to the Plaintiff by the congregation of worshippers in February 1881, and the obedience which *Sewloll* at first paid to his directions, shew that, in their opinion, he occupied a position of the highest authority, perfectly well known to them; that those events are inconsistent with the theory that his family had never intervened since the year 1825; and that they are not sufficiently accounted for by the family or spiritual character of the Plaintiff.

Going a little further back, we have evidence that *Sewloll* accepted appointment from the Plaintiff in the year 1878, through the agency of his jemadar *Sookloll*. Exhibit B is express to that effect. Some of the learned Judges have rejected that document, because it is not mentioned in this plaint, and because its custody is not clearly accounted for. But its execution in the presence of several people is positively deposed to by four witnesses, all rigorously cross-examined, and so entirely unshaken that Mr. *Mayne* did not think it worth while to refer to those cross-examinations. The person who could contradict them with effect is *Sewloll*, who is a Defendant, is a partisan of the principal Defendant *Poorooshottum*, and was in Court when the evidence against him was given. He did not come forward to say a word about it. Their Lordships think it is carrying mere suspicion too far when it is allowed to get rid of a document so proved, and so allowed to pass by the person most nearly concerned in it. It may be that *Sewloll* consulted his security by taking appointments from *Poorooshottum* and from the committee. But his taking one from the Plaintiff shews that

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the Plaintiff was then intervening, and that his position was recognized.

Again, travelling back to an earlier time, evidence is offered of the conduct of *Govindram*. Whether his mere declarations should be received as something against his interest is a question of some difficulty, which their Lordships would have investigated further if it had been necessary to decide it. But it was shewn by *Heerjee Meghjee* that when *Govindram* made the monthly collections, he pressed for them on the Plaintiff's account; and by *Suddasook* that he urged that offerings should be made at his Mundir because it was the Tickut's. Such conduct is clearly admissible, and is good evidence to shew that in *Govindram's* time the Plaintiff's position was acknowledged.

With respect to the bar by lapse of time, their Lordships do not consider this suit to be one in which the Plaintiff is seeking merely personal relief. Even apart from the sixth and seventh paragraphs of the plaint, which expressly put forth his spiritual character as the foundation of his claim, the nature of the suit is for the proper conduct of the Thakoor's worship. It rests quite as much on the right of the Thakoor to have the conduct of his worship and his own custody placed in the right hands, as upon the personal right of the Plaintiff to property. The suit would rather fall under art. 124 or art. 144 than art. 49. But under whichever of the three articles it falls the starting point of time is unlawful possession or adverse possession. And the evidence leads their Lordships to the conclusion that until the affray of May, 1881, there has been no possession of the Thakoor or of his possessions either unlawful or adverse to the Plaintiff.

The result is that on this part of the case their Lordships agree with the High Court, and on very nearly the same grounds as taken by the majority, whose opinion has prevailed there.

As regards the temple, the High Court thought the suit is barred by time. In that their Lordships cannot agree. The ground is dedicated to the Thakoors *Baharyjee* and *Dowjee*; and, except during the building time, it has been occupied by them ever since. If the fact was that the Thakoor *Dowjee* had been in the custody of, and his worship been regulated by, another

shebait than the Plaintiff for a sufficient time, the Plaintiff might be barred; but the reasoning on the former part of the case disposes of that suggestion. There has been no possession of the temple adverse to the Thakoor *Dowjee*, and no possession of the Thakoor adverse to the Plaintiff till May 1881.

Their Lordships are of opinion that this part of the case must be governed entirely by the terms of *Munnee Bibi's* dedication. She gave the house and land to the two Thakoors, but with the condition attached that *Poorooshottum* should be shebait. The Thakoor *Dowjee*, or those who speak for him on earth, need not take advantage of this gift. *Munnee Bibi* could not of her own authority alter the shebaitship of the Thakoor. But if the gift is taken and the condition insisted on, it must be observed. It has now been insisted on, and *Dowjee* must elect whether to change his habitation or to change his shebait.

It is true that money was raised to build the temple, and was raised mainly from the worshippers, and in the name of the Thakoor *Dowjee*. But the facts of this case are not such as to raise an equity of the kind suggested at the Bar, and favoured by one of the judgments delivered in the Division Court. There is no reason to suppose that the subscribers did not know of *Munnee Bibi's* deed; and there is no evidence that the subscriptions, though given to the Thakoor *Dowjee*, were given with any reference to the question who should be his shebait.

The decree of the High Court must be affirmed and both appeals dismissed, but there will be no order as to costs. Their Lordships will humbly advise Her Majesty to this effect.

Solicitors for appellant: *Barrow & Rogers.*
Solicitors for respondent: *Wrentmore & Swinhoe.*

Reported also 1 LR 17 Cal 137

J. C.* 1889 April 10.

NAWAB MUHAMMAD AMANULLA KHAN PLAINTIFF;

AND

BADAN SINGH AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Law of Limitation—Act XV. of 1877, *Arts.* 144 *and* 142—*Adverse Possession —Dispossession.*

Reported 16 I.A.14 Bom 462

Art. 144 of Act XV. of 1877, relating to adverse possession, only applies where no other article is specially applicable.

Where Plaintiffs were proprietors of land but declined to engage for the land revenue, in consequence of which the Defendants were admitted so to do and to obtain possession:—

Held, that there was a dispossession of the Plaintiffs within the meaning of art. 142, and that a suit by the Plaintiffs brought after the expiration of the thirty years' settlement with the Defendants was barred.

Cited 1 LR 19 Cal 666 (P.C.) 1 LR 19 Ind Cas. 140

APPEAL from a decree of the Chief Court (May 8, 1885), reversing a decree of the Commissioner of *Delhi* (June 24, 1884), and restoring that of the officiating Judicial Assistant Commissioner of *Delhi* (Oct. 29, 1883).

The facts are stated in the judgment of their Lordships.

Doyne, and *C. W. Arathoon*, for the Appellant.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Plaintiffs in this suit are descendants of one *Lutuffulla Sadik*, who held the land which was the subject of the suit as Mafi. The earliest sanad appears to have been, as far as the evidence shews, a grant by one *Afiz Khan* in the sixth year of the reign of the King of *Delhi*. It is not material when the title commenced. This Mafi was resumed in 1837, and at that time the ancestors of the Plaintiffs, who had the Mafi, were offered an engagement for the land revenue. They on the 5th

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of April, 1838, declined to take the land and engage for payment of the revenue. Then the Defendants, who are called in the judgments of the lower courts the lambardars, and were, the representatives of the villagers, and held a large quantity of land in the village, undoubtedly as proprietors, were asked if they would take up the engagement. They appear, in the first instance, to have declined to do so, alleging that they had got a settlement which included this land. However, it was found that this was not correct, and for a time the settlement operations were discontinued, and the Government appears to have held the land as khas. In 1842 a settlement was made, and than an engagement was made with the lambardars, or representatives of the villagers, for the whole of the village, including the land which is the subject of this suit, and making no distinction between the way in which this land and the other land, of which the villagers were undoubted proprietors, was to be held. That settlement was to last for thirty years, and would expire in 1872. Steps do not appear to have been taken immediately upon the expiration; but, on a revision of settlement in 1879, the Plaintiffs applied for what they called a cancelment of the farm to the Defendants, and to have possession of the land as their ancestral estate. The Defendants refused to surrender the land, and consequently the Plaintiffs were referred to the Civil Court, and then the present suit was brought.

Two questions were raised in the suit. One was, whether the Plaintiffs—or rather their ancestors—were the proprietors of the land as they alleged; and the other was whether the suit was barred by the law of limitation.

Upon the first question the Commissioner, before whom the case came by way of appeal, and whose finding on this matter was conclusive in the further appeal to the Chief Court, found that the Plaintiffs were the proprietors; and no question remains about that.

The question which has now to be determined is whether the suit is barred by the law of limitation. The Chief Court, upon the further appeal from the decision of the Commissioner, has held that it is barred. The Act applicable to the case is Act XV. of 1877, and the article is No. 142, which says that for possession

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of immoveable property when the Plaintiff, while in possession of the property, had been dispossessed, or has discontinued the possession, the time from which the period allowed for bringing the suit begins to run is the date of the dispossession or discontinuance. It appears to their Lordships to be clear that when there was this refusal on the part of the Plaintiffs, or their ancestors, to make the engagement for the payment of the revenue, and the Government made the engagement with the villagers—the Defendants—there was a dispossession or a discontinuance of possession of the Plaintiffs within the meaning of this article.

It is to be observed that the Lower Courts in their judgments treat it as being a dispossession. The Commissioner, where he deals with the facts of the case, says:—"Independently therefore of the presumption afforded by Regulation 31 of 1803, the Plaintiffs have, in my opinion, afforded most satisfactory evidence of their character as proprietors prior to the resumption of the lands in free tenure." Then he goes on:—"and their dispossession for refusing to engage at settlement." In his opinion what took place was that at the time when they so refused they became dispossessed. Then Mr. Justice *Plowden*, in the passage which is quoted from his judgment, treats it also as a dispossession, for he says:—"When, upon the occasion of a settlement, a proprietor is in proprietary possession of the estate, and asserts his proprietary title, and it is formally recognised, but in consequence of his refusal to engage for the revenue he is excluded from the enjoyment of his estate"—which was the case here—"which is therefore transferred to a farmer for a defined period, it is intelligible that there is not such a discontinuance of possession or dispossession as would support a plea of limitation"; and he goes on to give as the reason that the dispossession is not adverse, which word is not in art. 142. The Chief Court in their judgment say also:—"All this shews that in 1838 Plaintiffs were undoubtedly proprietors; but the land is now, and has been since 1842, equally undoubtedly in the possession of the Defendants, who have exercised over it all the rights of proprietors." There has been no possession of any description in the Plaintiffs or their ancestors since the period of the engagement with the

Defendants; and whether any proprietary right may have existed is not the question. It is whether there has been a dispossession or discontinuance, which there clearly was. No doubt the proprietary right would continue to exist until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applies, it appears to be clear that it comes within the terms of the art. 142, and if there has been any doubt in the minds of the Courts in the *Punjab* as to what was the effect of the law of limitation in cases of this description, it seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that inquiry. Art. 144 as to adverse possession only applies where there is no other article which specially provides for the case.

In this case their Lordships think art. 142 does provide for the case, and that the suit is barred by the law of limitation. Consequently the decision of the Chief Court should be affirmed and the appeal dismissed, and their Lordships will so humbly advise Her Majesty.

Solicitors for Appellant: *T. L. Wilson & Co.*

Reported also ILR 17 Cal 131

J. C.* 1889 April 9, 10.

TILUCKDARI SINGH AND OTHERS . . . PLAINTIFFS;

AND

CHULHAN MAHTON . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

See ILR 17 Cal 726 PB applying this case.

Abwabs—Regulation VIII. of 1793, *ss.* 54, 55 *and* 61.

Abwabs which have been paid according to long standing custom cannot be recovered unless they were payable at the time of the permanent settlement, and have been consolidated with the rent under sect. 54 of Regulation VIII. of 1793. Sect. 61 prevents their being so recovered unless consolidated, while sect. 55 renders new abwabs illegal.

ILR 11 Cal 175

APPEAL from a Full Bench ruling of the High Court (Jan. 19, 1885), reversing on second appeal a decree of the District Judge of *Gya* (March 21, 1883), and restoring that of the Subordinate Judge (May 31, 1882).

The question in appeal was whether the Appellants were entitled to recover certain sums which were entered in the zemindary papers as customary abwabs from their tenant.

Shows ILR 17 Cal 738, 740 747, 753 767.

The Respondent, while admitting that he held under the Appellants certain lands, some on payment of cash, or nakdi rent, and others on payment of rent in kind, or bhaoli rent, pleaded that the Appellants had entered in the nakdi and bhaoli luggit invalid abwabs and invalid cesses, and that they had preferred a claim in respect of the same, which was opposed to the usual practice and long standing custom.

Referred to ILR 16 Bom 21 — 22 Cal 688, 689 690

The Subordinate Judge held that the abwabs could not be realised under the law.

The District Judge, as regards the nakdi, or cash rent, held as follows:—

"The Plaintiff has proved by the evidence of the putwari and some of the other ryots of this village that these cesses have been paid for many years, and there can be no doubt that such cesses are prevalent in this district."

Then as regards the bhaoli rents the District Judge proceeded:—"I may notice a few of the salient features of this

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system. In the first place, the landlord does not in reality get a half-share of the produce. He only gets a share of the grain. The straw, chaff, &c., is appropriated entirely by the cultivator. It will be noticed that the Lower Court offered the Defendant to divide the whole produce equally between him and the landlord, but this offer was refused; and why? because it has always been the custom for the ryot to take the straw, &c. If so, the landlord should surely be allowed to plead that he is entitled to the dues he claims, because the ryot has always been in the habit of paying them. Again, the expenses connected with the maintenance of irrigation works on which depend the crop, fall on the landlords; they also have to defray the costs of any litigation connected therewith. The very existence of the crops in this district depends on an artificial system of irrigation which has to be kept up at much expense. If the system of payment in kind were converted into one of payment in cash, the landlords would neglect to keep up these works which, under the present system, it is for the mutual advantage of landlord and tenant to keep in good repair and working order. It must also be borne in mind that the landlord has to pay his Government revenue punctually in cash, whether the season be good or bad; whereas the ryot having to pay in kind is not to the same extent affected by bad seasons."

He found the following two facts proved:—

1. That these dues have been collected and paid from time immemorial.

2. That having regard to the peculiarity of the bhaoli system they are not excessive.

In appeal the High Court, finding there were conflicting decisions, referred the following question to a Full Bench:—

"Whether assuming that the abwabs in question have by the custom of the estate of which the lands form part been paid by the Defendant and his ancestors for a good many years, they are legally recoverable by the Plaintiff although they are not actually proved to have been paid or payable before the time of the permanent settlement."

On the 19th of January, 1885, a Full Bench of five Judges, after a consideration of sect. 54, Regulation VIII. of 1793, sect. 3

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of Regulation V. of 1812, sect. 10, Act X. of 1859, and sect. 11, Act VIII. of 1869 of the *Bengal* Council, recorded judgments answering the question in the negative, and the suit as regards those abwabs was dismissed.

C. W. Arathoon, for the Appellants, contended that this ruling was erroneous. The liability to these cesses or abwabs arose from the incidents under which the lands were originally let to the ancestors of the respondent. The express terms of the contract did not include them, but by force of the custom held by the District Judge to have been established by the evidence such liability was imported into the contract and must be deemed a part of the terms of the tenancy. The abwabs claimed were not indefinite or arbitrary, but part and parcel of the rent. They were prevalent in the district from time immemorial. Reference was made to *Dhalee Puramanick* v. *Anand Chunder Tolaputtur* (1); *Sonnum Sookul* v. *Shaikh Elahee Buksh* (2); *Lachman Rai* v. *Akbar Khan* (3); *Bholanath Mookerjee* v. *Brijo Mohun Ghose* (4); *Budhna Orawan Mahtoon* v. *Juggessur Doyal Singh* (5); *Juggodish Chunder Biswas* v. *Turrikoollah Sircar* (6); *Serajgunje Jute Company, Limited* v. *Torabdee Akoond* (7). See Regulation V. of 1812, sect. 1; Regulation VIII. of 1793, sects. 54, 55 and 61; Regulation XXX. of 1803, and VII. of 1822. Cesses were not absolutely abolished until Act VIII. of 1869 (*Bengal* Council).

The Respondent did not appear.

1889 April 10.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

Their Lordships are of opinion that this appeal ought to be dismissed. The first question seems to be this: are these payments, over and above rent, properly so called, abwabs within the meaning of the word as used in Regulation VIII. of 1793? They are described in the plaint as "old usual abwabs;" and

(1) 5 Suth. W. R. Act X. Rul. 86.
(2) 7 Suth. W. R. 453.
(3) Ind. L. R. 1 Allah. 440.
(4) 14 Suth. W. R. 351.
(5) 24 Suth. W. R. 5.
(6) 24 Suth. W. R. 90.
(7) 25 Suth. W. R. 253.

they are also described as abwabs in the zemindary accounts. It appears to their Lordships that the High Court was perfectly right in treating them as abwabs, and not as part of the rent. Unquestionably they have been paid for a long period—how long does not appear. They are said to have been paid according to long standing custom. Whether that means that they were payable at the time of the permanent settlement or not is not plain. If they were payable at the time of the permanent settlement they ought to have been consolidated with the rent under sect. 54 of Regulation VIII. of 1793. Not being so consolidated they cannot now be recovered under sect. 61 of that regulation. If they were not payable at the time of the permanent settlement they would come under the description of new abwabs in sect. 55; and they would be in that case illegal.

Under these circumstances it appears to their Lordships that the High Court was right in treating them as payments or cesses which could not be recovered.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal.

Solicitors for Appellants: *T. L. Wilson & Co.*

Reported also ILR 13 Bomb 520

J. C.* 1889 April 6, 12.

NAVIVAHOO AND OTHERS . . . . . APPELLANTS;

AND

TURNER (OFFICIAL ASSIGNEE) AND OTHERS RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Reported ILR 2 Bom 409 — 22 Reprd 82

Indian Insolvency Act, s. 86—Judgment entered up by High Court—Right to Execution—Limitation Act, 1877, art. 180—"Ordinary Jurisdiction."

In 1868, in pursuance of an order of the Insolvency Court of *Bombay*, a judgment was entered up in the High Court against an insolvent, and in 1886 the Insolvency Court ordered that execution should be taken out thereunder:—

Cited ILR 26 Cal 31

Held, that this was a judgment entered in the exercise of the High Court's ordinary original civil jurisdiction, but that as, under sect. 86 of the Indian Insolvency Act (11 & 12 Vict. c. 21), no present right accrued to the official assignee to move for execution until after the order of 1886 was made, his application a few days afterwards was within time under art. 180 of Act XV. of 1877.

The "ordinary jurisdiction" of the High Court embraces all such as is exercised in the ordinary course of law, and without any special occasion or special order being necessary therefor.

ILR 11 Bom 139

APPEAL from an order of the High Court (Dec. 10, 1886), reversing an order of *Scott*, J. (July 5, 1886), and declaring that a certain application for issue of execution was not barred by limitation.

The facts are stated in the judgment of their Lordships.

Scott, J., held that sect. 86 of the *Insolvency Act* did not exclude the operation of the law of limitation.

The judges of the High Court (*Sargent*, C.J., and *West*, J.) in reversing this order differed in their reasons. *West*, J., agreed with the lower Court in holding that the statute applied to such a case, but he held that it did not apply in the particular instance, as no right had accrued to any one to apply for execution of the order sought to be executed. He said:—

"A real difficulty, however, arises from the peculiar wording of art. 180 of Sched. II. of the *Limitation Act*. I cannot see that a present right to enforce the judgment accrues 'to any

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person' in a case such as the present until the Insolvent Court's order is made to take out execution. The action of the Commissioner is not merely formal. He exercises a discretion in allowing execution or not, and that discretion has not been annulled by the change in the procedure that follows on his order. An application must be made to him, and he must consider the facts, and, until he has given his order based on them, no right can have accrued to any one to apply to the High Court for execution. If the condition were merely one within the power of the official assignee to satisfy, he could not be allowed, by purposely failing to satisfy it, to postpone obtaining the order for an indefinite time. Non-fulfilment would, in such a case, be turned against him who was the cause of it. But here the condition is the Commissioner's conviction that the state of facts is one in which execution may properly be ordered. The order in this case was made last April, and there was nothing in the *Limitation Act* to prevent that order from being applied for. The right to execution, which arose on the date of the order, was not affected by art. 180 when effect was sought for it a few days afterwards, and therefore I think the decision of the Court below must be reversed."

The Chief Justice, Sir *Charles Sargent*, was of opinion that the *Statute of Limitation* did not apply in any such case. He said:—

"Now, the Indian *Insolvency Act* was framed on the same lines as the English *Insolvency Acts*, commencing with 23 Geo. 3, cc. 1 and 2, down to the passing of the *Bankruptcy Act* of 1861, which abolished the distinction between insolvency and bankruptcy, the principle of which Acts, although varying the modes of giving effect to it, has always been held to be that the future property of the insolvent should be liable for his debts. I need only refer to the remarks of the Master of the Rolls in *Barton* v. *Tattersall* (1), where it was held that the debts of the insolvent could be proved in a suit for the administration of the estate, and of Lord *Hatherley* in *Ex parte Pain* (2), where the latter, discussing the effect of sects. 87 and 88 of statute 1 & 2 Vict. c. 110, the former of which is similar in its practical effect to

(1) 1 Russ. & M. 237.

(2) Law Rep. 3 Ch. 639.

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sect. 86 of the Indian Act by providing that the insolvent, before his discharge, must give a warrant of attorney to enable the provisional assignee to obtain execution against his future property for the benefit of his creditors, says: 'The insolvent cannot obtain his discharge except upon the condition of his making over all his future property of every kind for the benefit of his creditors.' Such being the policy of the Indian *Insolvent Act*, it is plain that it would be to a great extent defeated if judgment entered up by the order of the Insolvent Court under sect. 86, and which is the machinery provided for effecting that object, could only be executed within a limited time. The spirit, therefore, of the well established rule of construction of Acts, that generalia specialibus non derogant, requires that the *Limitation Acts* should not be deemed applicable to judgments entered up under sect. 86, unless their language clearly requires it.

"Such is not the case, in my opinion, with the language of the two clauses of the Act of 1877, which have been relied on as constituting a bar to the judgment in question. Art. 180 relates to an application to enforce a judgment, decree, or order of any Court established by royal charter in the exercise of its ordinary original civil jurisdiction. Now a judgment entered up under sect. 86 is doubtless a judgment of a Court established by royal charter, but it is not a judgment entered up in the exercise of its ordinary civil jurisdiction, but under sect. 86 of the *Insolvent Act*, the jurisdiction under which formed no part of the ordinary civil jurisdiction. Again, the period of limitation fixed for such judgments, namely twelve years from the time a present right to enforce the judgment accrues to some person capable of releasing the right, is quite inapplicable to judgments which could only be enforced by order of the Insolvent Court, and could not be released by any person, which must clearly mean lawfully released. As to sect. 178, it is to be remarked that a fresh right to execute the judgment is constantly accruing under sect. 86, whenever the Insolvent Court orders it.

"I am of opinion, therefore, that the judgment in question was not barred, and that the order of the Court below should be discharged, and that execution should issue on the judgment."

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Rigby, Q.C., and *Mayne*, contended that the law of limitation applied, and that the application was necessarily barred. The execution must be conducted in accordance with the rules relating thereto laid down in *In re Bhugwandas Hurjivan* (1). The judgment had not been revived under sect. 248. Arts. 179 and 180 of Act XV. of 1877 exhaust all applications for execution, and there is no possibility for such an application as this. Or it is an application to execute a decree passed in the extraordinary original civil jurisdiction of the High Court, and therefore under art. 178 it is barred within three years. Reference was made to the *High Courts Act* of 1861, sects. 11–18, and the letters patent of the 28th of December, 1865.

Cohen, Q.C., and *Macpherson*, for the Respondent, contended that Act XV. of 1877 did not apply to or affect applications to execute judgment entered up under sect. 86 of the *Indian Insolvent Act*. The Code of Civil Procedure does not apply to the Insolvent Court at all: see sect. 638. Under sect. 86 of the *Insolvency Act* application must be made to the Insolvency Court before execution issues. Reference was made to *Bai Manekbai* v. *Manekji Kavarji* (2); *Sturgis* v. *Joy* (3). If Act XV. of 1877 applies the period of limitation does not begin to run until the date of sanction by the Insolvent Court under sect. 86 of the issue of execution, that is in this case from the 5th of April, 1886. The judgment was entered up in the exercise of ordinary civil jurisdiction, which embraces all jurisdiction exercised in the ordinary course without any extraordinary step being taken to invoke it.

Rigby, Q.C., replied.

1889
April 12.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

On the 19th of August, 1868, the Insolvency Court of *Bombay* ordered that a judgment should be entered up in the name of the official assignee against the insolvent *Candas Navivahoo* for

(1) Ind. L. R. 8 Bomb. 520, see sect. 227 C. C. P.

(2) Ind. L. R. 7 Bomb. 213.

(3) 2 E. & B. 739.

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a sum exceeding sixteen millions of rupees. That judgment was accordingly entered up in the High Court.

It does not appear whether anything was done under the judgment till the 5th of April, 1886, when the Insolvency Court ordered execution for a sum of nearly five millions to be taken out against certain properties described in the order.

The representatives of the insolvent, being summoned to shew cause why the judgment should not be executed, assigned as cause that under the operation of the *Indian Limitation Act*, 1877, the right to have execution was barred by lapse of time. It will be convenient to state here the effect of the articles in the schedule of the Act of 1877 which had been put forward as applicable to the case, taking them in reverse order. The amendments of this Act by Acts XII. of 1879 and XIV. of 1882 do not affect the present question.

By art. 180 an application to enforce a judgment of any Court established by royal charter in the exercise of its ordinary original civil jurisdiction is barred unless made within twelve years from the time when a present right to enforce the judgment accrues to some person capable of releasing the right. By art. 179 an application for the execution of a decree or order of any Civil Court, not provided for by No. 180 or by the Code of Civil Procedure sect. 230, is barred unless made within three years from various points of time. It may be taken for the purpose of the present case that the starting point of time would be in the year 1868. By art. 178 an application for which no period is provided elsewhere in the schedule to the Act or by the Code of Civil Procedure, s. 230, is barred unless made within three years from the time when the right to apply accrues.

The case was heard before Mr. Justice *Scott*, who held that the application was barred by time. From his judgment it is to be gathered that he thought the case was governed by either art. 179 or art. 180; but it does not appear which. There is a great difference between the two; for art. 179 assigns a fixed starting point of time, whereas art. 180 assigns one that is dependent on the right to enforce the judgment.

On the appeal of the official assignee the case was heard before Chief Justice *Sargent* and Mr. Justice *West*, who reversed the

order of the Court below, and directed that execution should issue. *West*, J., held that the case falls under art. 180, and that no present right accrued till the order of the Insolvency Court made on the 5th of April, 1886. *Sargent*, C.J., held that the case is not provided for by the Limitation Act at all. From this order of the High Court the present appeal is brought. And the first question is, whether the judgment of 1868 was entered up in exercise of the ordinary original civil jurisdiction of the Supreme Court.

By sect. 86 of the *Indian Insolvency Act*, it is provided that the Insolvency Court may direct a judgment to be entered up in the Supreme Court; that the production of the order of the Insolvency Court shall be sufficient authority to the officer of the Supreme Court for entering up the judgment; that if at any time it shall appear to the satisfaction of the Insolvency Court that the insolvent is of ability, or has left assets, to pay debts, that Court may order execution to be taken out upon the judgment; that such further proceedings may be had upon the judgment as the Insolvency Court may from time to time order, until the debts are fully paid; and that no *scire facias* shall be necessary to revive or to execute the judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the Insolvency Court from time to time.

By the *High Court Act* of 1861 Her Majesty received power to erect High Courts, and sect. 11 enacts that all provisions applicable to the Supreme Courts and to their Judges shall be taken as applicable to such High Courts and to their Judges respectively.

The Royal Charter which regulates the *Bombay* High Court, under the provisions of the *High Court Act*, is dated the 28th of December, 1865. Sects. 11 to 18 are a group of clauses headed "Civil Jurisdiction of the High Court." Sects. 11 and 12 describe the local limits of the ordinary original civil jurisdiction, which is said to extend to all kinds of suits within those limits except small cause suits. Sect. 13 gives to the High Court power to remove and to try as a Court of extraordinary original jurisdiction any suit falling within the jurisdiction of any Court subject to its superintendence, when it shall think

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proper, either on agreement of the parties, or for the purposes of justice. Sects. 15 and 16 confer appellate jurisdiction. Sect. 17 confers authority over infants, idiots, and lunatics. Sect. 18 ordains that the Court for relief of insolvent debtors shall be held before one of the Judges of the High Court, and that the High Court and any such Judge shall have such powers as are constituted by the laws relating to insolvent debtors in *India*.

From this brief statement of the material statutes and charters, it appears that, though the Insolvency Court determines the substance of the questions relating to the insolvent's estate, such as the amount of the judgment to be entered up against him, and the propriety of issuing execution upon it, the proceedings in execution are the proceedings of the High Court, and the judgment itself is the judgment of the High Court. And it is clearly entered up in the exercise of civil jurisdiction and of original jurisdiction.

But it was strongly contended at the bar that this jurisdiction, though civil and original, was not ordinary; and Mr. *Rigby* argued that the passages of the charter which have just been epitomized divide the jurisdiction into four classes, ordinary original, extraordinary original, appellate, and those special matters which are the subject of special and separate provisions. But their Lordships are of opinion that the expression "ordinary jurisdiction" embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it; and that it is opposed to extraordinary jurisdiction which the Court may assume at its discretion upon special occasions and by special orders. They are confirmed in this view by observing that in the next group of clauses, which indicate the law to be applied by the Court to the various classes of cases, there is not a fourfold division of jurisdiction, but a threefold one, into ordinary, extraordinary, and appellate. The judgment of 1868 was entered up by the High Court, not by way of special or discretionary action, but in the ordinary course of the duty cast upon it by law, according to which every other case of the same kind would be dealt with. It was therefore entered up in exercise of the ordinary original civil jurisdiction of the High Court; and no present right accrued to the official assignee to

to move for execution until the order of the 5th of April, 1886, was made.

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The order of the High Court, which is appealed from, is dated the 10th of December, 1886. After the appeal was presented, and on the 2nd of March, 1888, the High Court amended the order, by remanding the case to the Court below, with a declaration that the application for execution was not barred instead of directing execution at once. Strictly speaking such an alteration of the order appealed from was beyond the competence of the Court, but their Lordships accept the alteration as indicating the opinion of the High Court as to the best form of order. The present order therefore should be that of 1886 as varied by the High Court itself in 1888. Subject to this variation the appeal must be dismissed, and with costs, and their Lordships will humbly advise Her Majesty to this effect.

Solicitors for Appellants: *Macfarlane & Lefroy.*
Solicitors for Respondent: *Payne & Lattey.*

Reported also 14 R 16 Cal 636 Cal

[PRIVY COUNCIL.]

J. C.* 1888 Dec. 6, 19.

In re TWIDALE'S PETITION.

Admission to practise as an Agent—Rules of 31st March, 1870, sects. 2, 3.

Under sects. 2 and 3 of the Rules of 31st of March, 1870, only solicitors or others practising in *London*, or solicitors admitted by the High Courts in *India* or the corresponding Courts in the Colonies, can be admitted to practise in the Privy Council. The Judicial Committee have no power to extend at their discretion the class of those eligible.

PETITION by *R. E. Twidale*, a pleader in the High Court at *Calcutta*, to be admitted as agent to practise in the Privy Council, upon his subscribing the declaration prescribed by the Order of Her Majesty in Council of the 30th of March, 1870, "to be observed by proctors, solicitors, agents, and other persons admitted to practise before Her Majesty's honourable Privy Council."

* *Present*:—LORD FITZGERALD, LORD HOBHOUSE, and SIR RICHARD COUCH.

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The 2nd and 3rd of these rules are as follows:—

"2. Every proctor, solicitor, or attorney practising in *London*, and duly admitted in any of the Courts of *Westminster*, shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council upon the production of his certificate for the current year.

"3. Persons not being certificated *London* solicitors, but having been duly admitted to practise as solicitors by the High Courts of Judicature in *India*, or in the colonies, respectively, may apply by petition to the Lords of the Judicial Committee of the Privy Council for leave to be admitted to practise in the Privy Council; and such persons, if admitted to practise by an order of their Lordships, shall pay annually, on the 15th of November, a fee of five guineas to the fee fund of the Council Office."

Doyne, for the petitioner, contended that it was not the effect of those rules to limit the discretion of the Committee and to confine the class of persons eligible for admission to those who were thereby specially described. There were no negative words in those rules. They were enabling and not disabling. He referred to the case of *In re W. Tayler's Petition.*

1888
Dec. 19.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

Since this case was argued their Lordships have considered the matter very carefully, and they have been furnished with a copy of the shorthand notes of the proceedings on Mr. *Tayler's* petition; and they find with some regret that they are unable to accede to Mr. *Twidale's* request.

Mr. *Twidale* is a vakeel of high standing and reputation in the *Calcutta* High Court, but he had not been admitted as a solicitor anywhere, in *England* or *India*. He now applies to be admitted to practise here as an agent, and the question is whether the Orders in Council admit of such an application being granted. No doubt there is some ambiguity about them; because, in general terms, they referred to "proctors, solicitors, or agents." There are four sections of the order relating to the subject, and

in the first and fourth of those sections all those terms are mentioned; but the two sections which shewed what is the mode of admission and the classes to be admitted are the second and third; and those only apply either to solicitors or others practising in *London*, and to solicitors admitted by the High Courts in *India* or the colonies respectively. The question is whether those rules 2 and 3 are exhaustive of the classes to be admitted; or, as was argued at the bar, they only specified what should be done in the case of those two classes, and left an undefined class called "agents," who were to be admitted at the discretion of the Committee. Mr. *Tayler's* case is exactly in point. Mr. *Tayler* also was a vakeel of the *Calcutta* High Court, and he had not been admitted as a solicitor anywhere. He applied for leave to practise at this bar. His counsel, Sir *Roundell Palmer* (Lord *Selborne*) put the case very much as Mr. *Doyne* has done. Lord *Cairns*, on behalf of the Committee, said in that case, "the qualifications are in the schedule." That means in the Orders, I suppose. It is a mistake of the shorthand writer. "The third appears to be the only one upon which any claim can be made. The third applies to solicitors practising in *India*." Then Sir *Roundell Palmer* says, "Yes, I see there are affirmative words which do not embrace this case. I do not perceive that there are any negative words which would exclude it." Well, that is precisely the argument which Mr. *Doyne* put at the bar here. The answer to this is, "Lord *Cairns*:—There was an obvious reason for specifying the classes which are here specified. I do not say what may or may not be done hereafter, with regard to the very wide class of vakeels who are under very different jurisdictions, but certainly they are not included at present in the order." That (as would be seen) is exactly in point. Their Lordships collect that the Committee on that occasion, as on this, were by no means disinclined to grant the petition if it were within their power. But it has been expressly decided that it was not within their power; and their Lordships now must follow that decision and refuse the application.

Solicitors for petitioner: *T. L. Wilson & Co.*

Reported also 17 Cal 122

J. C.* 1889 March 27, 29; May 14.

TARACHURN CHATTERJI . . . . . DEFENDANT;

AND

SURESH CHUNDER MOOKERJI AND OTHERS . . . . . } PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Will—Construction—Widow's Power to adopt.

The following points were ruled in construing the will of a Hindu testator:—

(*a*) A direction to make over the estate to the son when he comes of age is equivalent to a gift to him to take effect at that time.

(*b*) A provision to meet the contingency "if my son dies" in order to be consistent with an absolute gift on his attaining majority must mean "if my son dies during minority."

(*c*) "Dakhilkar," though ordinarily meaning "occupant," must be construed in reference to the context and *held* to mean possessor and manager, though without beneficial interest.

Held, that the testator's widow took no power to adopt under the will in the event which happened, viz., of his estate having vested in his son and afterwards in the son's widow.

Thayammal v. *Venkatarama Aiyan* (Law Rep. 14 Ind. Ap. 67) followed.

APPEAL from a decree of the High Court (May 7, 1886) reversing a decree of the Subordinate Judge of the 24-Pergunnahs (Sept. 10, 1884), and decreeing the Respondents' suit as prayed. The Respondents sued the Appellant and three others for a declaration that they were entitled to the share of one *Kali Churn* in the joint family property and for a partition.

The questions in appeal were as to the construction and effect to be given to two wills, viz., the will of *Madhub Chunder Chatterji*, dated the 13th of October, 1845, and the will of *Kali Churn Chatterji*, dated the 14th of October, 1853, as to which the Courts below differed in opinion.

The wills in question are sufficiently set out in the judgment of their Lordships.

The view of the High Court respecting the construction and effect of *Kali Churn's* will is thus expressed:—

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

"Together with the terms of the will of *Kali Churn* it will be convenient to consider the issue of limitation.

"It is contended that possession adverse to the Plaintiffs commenced to run from the death of *Kali Churn* in 1260 (1853), and that consequently this suit, instituted in 1883, is barred. Much stress has been laid on the word 'dakhilkar' in the will of *Kali Churn*, and it has been contended that this term applies to one holding possession by virtue of his own title, and not to a possession held on behalf of another as an executor or trustee.

"In our opinion, the expression is not so used by *Kali Churn*. We observe that when referring to a possession of this description, the word 'bhoge' is added to the word 'dakhil.' Moreover this would not be the ordinary meaning of 'dakhilkar.' Having regard to the position of *Kali Churn* and the circumstances and time at which this will was executed, we think that an unusual or technical signification should not be applied to this term. There is nothing in the context to lead one necessarily to conclude that the term was so used by the testator. The terms of this will seem to us to indicate the intention of *Kali Churn* to lay down certain rules for observance in the management of his property on his death, and to give power to his widow to adopt under certain conditions, so that the inheritance should proceed in accordance with Hindu law rather than out of the usual course. When *Kali Churn* made his will, his widow and his nearest and, as far as we know, his only male relative *Tarachurn* were both minors, and it was necessary that he should frame some scheme for the management of his property; but we do not think that he intended to disinherit his widow or in any way, except by a power to adopt, to alter the devolution of his estate. Owing, probably, to an unintentional oversight or to an ignorance on his part or on that of the draftsman of his will, of the provisions of *Madhub's* will, *Kali Churn* empowered his widow to adopt only in case his mother should fail to exercise the power conferred on her by his father's will, overlooking the fact that his mother could adopt only with the consent of his uncle *Anund*, who had then been dead several years, and that consequently this power had become inoperative. The will also provides that until *Tarachurn's* majority, his step-

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mother, *Srimati Debi*, should be in joint management, as his representative, of the estate, and from the litigation to which reference has been made, it would seem that this arrangement was acted upon.

"On *Tarachurn* attaining majority, it was further provided that he should become dakhilkar of the entire estate, including both his own and *Kali Churn's* share. The testator's widow is directed to adopt a son of *Tarachurn*, or, in the event of *Tarachurn* having no son, to adopt a suitable person. The testator's wish is expressed, that the property should remain joint, that his widow should live with the family, and that if there should be any disagreement and she should live in her own father's house, she should receive maintenance. In the event of her not making an adoption, it is provided that she should have no concern with or rights to the goods and properties; but inasmuch as no term is specified within which she was to adopt, this stipulation would have no effect until she became physically incapable of adopting. There is nothing in the will to shew any intention on the part of the testator to disinherit his widow. The only portion of the will bearing in that direction, as has been already pointed out, relates to her receiving maintenance in a certain sum in the event of her finding it necessary to leave the family house and reside with her father, and on her failure to adopt, which, for reasons stated, is inoperative.

"The object of the testator in giving her maintenance only in the event of her leaving his house, was not to disinherit her, but to ensure that the property should remain joint.

"The will declares that 'he who will be heir for the time being will jointly continue in possession of all the aforesaid properties with his co-sharers.' Looking at the general scheme of the will, we think that the widow would be included in the term 'heir for the time being.'

"In our opinion, therefore, on the death of *Kali Churn*, his minor widow became entitled to his estate, which was to be under the management, first, of his step-mother, *Srimati Debi*, and then, on his attaining majority, of the senior male member *Kali Churn*; that a son was to be adopted, but that no provision was made for the inheritance in the event of failure to make this adoption.

"The only bequest that we find in the will, is that, on his majority, *Tarachurn* was to receive the wearing apparel of the testator.

"We are, further, of opinion, that *Srimati Debi*, and after her *Tarachurn*, were in possession of *Kali Churn's* estate as trustees for *Matangini* and the lawful heirs of the deceased. Therefore there was no adverse possession as against *Matangini* or the heirs of *Kali Churn* up to 1871."

Cowie, Q.C., and *Doyne*, for the Appellant.

Mayne, for the Respondents.

1889
May 14.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Appellant (one of the Defendants in the suit) is the son of *Anund Chunder*, who died in 1850. The Respondents (the Plaintiffs in the suit) are the grandsons of *Madhub Chunder*, the brother of *Anund*. He died on the 14th of October, 1845. *Madhub Chunder* had a son *Kali Churn*, who died on the 23rd of October, 1853, after attaining majority, and a daughter *Thakomoni*, the mother of the Respondents. *Kali Churn* left a widow *Matangini*, who died on the 21st of December, 1879. The property in suit is the share of *Madhub* in the joint property of himself and *Anund*, and the Respondents are entitled to it by inheritance if it is not disposed of by the will of *Madhub*, which was made shortly before his death, or by the will of *Kali Churn*, by virtue of one or the other of which the Appellant claimed to be entitled to the property. It was not disputed that the will of *Kali Churn* was genuine, and *Madhub's* was found to be so by both the lower Courts. The only questions in this appeal are as to the construction of these wills.

The will of *Madhub* addressed to his brother *Anund*, after stating that he had a half-share in their joint property, and giving directions for the payment of debts and the maintenance of his wife and son and daughter, and the education of the son and other matters, says, "God forbid but if my minor son should die and my daughter should get married and a grandson be born,

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then on the said grandson's attaining majority you will give him half of my share whatever it may be and give half to your son, God forbid, but if she having no son becomes a widow then you will pay her Rs.4 a month for maintenance. You shall perform the Sharodia (Doorga) puja, srads of parents and others, and pay perquisites and presents to the spiritual guide and family priest according to the circumstances and your sense, God forbid, if you die before my son and daughter attain majority then you may appoint attorney whomsoever you may think fit. You shall account for and make over whatever remains of the estate after payment of debts to my son when he comes of age. If you be of opinion that my half-share should be sold and Company's papers should be purchased (with the proceeds) you may sell it for its proper value. Further if my only son dies before he gets children my wife may with your consent adopt a son." It has been found by the High Court and is not now disputed that *Tarachurn* was born before the date of this will.

The direction to make over the estate to the son when he comes of age has the effect of a gift to him to take effect at that time, and the words "If my minor son dies" in order to be consistent with that must mean dies during minority. On the son's death after coming of age leaving *Matangini* his widow *Madhub Chunder's* wife would not have power to adopt a son, the estate of *Kali Churn* having become vested in his widow: *Thayammal* v. *Venkatarama Aiyan* (1).

The will of *Kali Churn* is now to be considered, as if the Appellant has any title to the property it must be under that. In the official translation of it in the record of proceedings, it is said in several places to be torn and illegible, and it was agreed before their Lordships that the statement of it in the judgment of the Subordinate Judge should be taken as correct. This is as follows, the figures 1, 2, &c., being inserted by the Judge.

"The testator after describing the properties standing swanami and benami and in possession and out of it, and stating that his father *Madhub* and *Madhub's* elder brother *Anund*, had jointly acquired them with their own earnings, and were in joint possession and enjoyment (dakhal voge) thereof and were perform-

(1) Law Rep. 14 Ind. Ap. 67.

ing the ceremonies and maintaining the family with the profits and their own earnings, says in the will:—'As my younger uncle died leaving no issue or widow in 1248, during the lifetime of my father and the elder uncle, they remained in possession (or were possessors-dakhilkar) of all the estate. In the meantime, through the influence of evil stars they became heavily involved in debts, and before they were all paid off, my father died in Assin 1252. I was then a minor, and *my mother Srimati Debi was my guardian in law Courts under the guidance of my elder uncle*, who with his own earnings and the profits of the estate performed the ceremonies and maintained the family, myself and my mother as before, and paid off a large proportion of the debts, died in Srabun 1257, leaving his minor son *Tarachurn Chatterji* and my aunt, his widow, as his heirs. The said aunt through evil advice of bad men being about to divide the properties, I, on attaining my majority in 1257, made statements in some Courts with regard to some of the properties as if they were my father's self-acquired and exclusive properties, with a view to prevent the threatened division (or partition), and taking upon myself the payment of debts due, some of the creditors made arrangements with them and am gradually paying them off. But, in fact, maintaining those properties, debts, and dues still joint, I am in joint possession (dakhilkar) of the whole estate in conjunction with my said aunt, and am performing the ceremonies and maintaining the family. But I am so seriously ill now that my life is despaired of, and man is mortal and life is uncertain. I, therefore deem it proper to make a will of the properties that will fall to my share. So laying down these rules I make my will, that (as) ere this my mother was my guardian according to the anumati-patra of my father and my elder uncle's consent, (1) I appoint my mother (step) the executrix of my said whole estate. So long as my cousin brother *Tarachurn* does not attain majority, my mother in conjunction with my aunt shall maintain and protect my minor wife *Matangini Debi*, and perform the ceremonies and maintain the family as before, pay off the creditor's debts, conduct the lawsuits already pending in Courts, or to be instituted hereafter, file documents, pay debts howsoever incurred, take back documents and realize dues. (2) Afterwards

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on attaining majority, my cousin-brother *Tarachurn* becoming possessor (dakhilkar) of my share *as well as the share of my elder uncle*, shall maintain my mother and wife. (3) Further, I being the only son of my father, *it is provided in his said anumatri-patra that if I die before the birth of any issue, my mother shall adopt a son according to Shastras.* If my mother does adopt a son, well and good; otherwise on attaining majority my wife shall adopt one of *Tarachurn's* sons, and shall pass her time (life) under the kurtaship (management and protection) of *Tarachurn.* God forbid, if *Tarachurn* does not get issues, then she may adopt a son of somebody else fit for the purpose. (4) When the ijmali properties have not hitherto been partitioned, they shall remain joint. (5) And save and except turuf *Belpukhuria* chuck lands purchased in auction, *nobody shall have power to dispose of any other property by mortgage, gift, or sale.* (6) The heir for the time being shall remain in possession (dakhilkar) of the aforesaid whole estate jointly with the co-sharer and perform the ceremonies and maintain the family, take proper notice of my sister and cousin-sister, and my wife shall accept muntra (spiritual or religious initiation) according to the kulachar (family custom) from my spiritual guide, or whomsoever may be living of the family of my guru, and shall live in my house. (7) *My mother and others* shall cause her to perform the proper religious ceremonies. (8) If there be disagreement in any respect and she lives in her father's house, she shall get Rs.10 per month for her maintenance from my *mother and others.* (9.) If she does not adopt a son in the manner heretobefore provided for, there shall remain (or be) no concern (elaka) with and right (sattwa) to the estate and things, &c., on the part of my wife. (10.) My clothes and raiments are left in the care of my mother and aunt. *Tarachurn* shall get them (paibek) when he comes of age. (11.) Except those (clothes and raiments) the ijmali metal plates and utensils and those used for puja and the whole of the immovable and moveable estate are left ijmali. (12.) My mother and aunt may sell the said *Belpukhuria* chuck lands . . . . to pay off debts or to purchase other properties nearer home.' . . . ."

In the Lower Courts much stress appears to have been laid on the word "dakhilkar," which it was contended applied to one

holding by virtue of his own title, and not to a possession held on behalf of another as an executor or trustee. The ordinary meaning of the word is "occupant," but the testator where he says he is in joint possession of the whole estate in conjunction with his aunt, and where (at No. 9) he says the heir for the time being shall remain in possession of the aforesaid whole estate jointly with the co-sharer and perform the ceremonies and maintain the family," appears to give it a larger meaning. In order to see what it means in the sentence, "Afterwards on attaining majority my cousin-brother *Tarachurn* becoming possessor (dakhilkar) of my share as well as the share of my elder uncle shall maintain my mother and wife," the context must be looked at. These are the only words that can operate as a gift to *Tarachurn*. The testator begins by appointing his stepmother executrix, meaning manager of his estate. So long as *Tarachurn* does not attain majority she is to manage in conjunction with his aunt. On attaining majority *Tarachurn* is to become possessor of the share, whether in the same capacity as the stepmother or otherwise is doubtful, but what follows assists in discovering the intention of the testator. He alludes to the provision in his father's will that if he dies without issue his mother should adopt a son who apparently he thinks would take the estate, and he says that if his mother does not adopt a son his wife shall adopt one of *Tarachurn's* sons, and if *Tarachurn* has no sons she may adopt the son of somebody else. That he wished an adoption to be made is apparent from the direction (9), that if his wife did not adopt a son she was to have no concern with and right "to the estate and things, &c.," and the words at (6), "The heir for the time being shall remain in possession," seem to be intended to refer to an adopted son rather than to *Tarachurn*. If the intention was that *Tarachurn* on attaining majority was to take the estate for his own benefit it would be giving him a direct interest to prevent the wife making an adoption, which he might do by refusing to give one of his sons and thus defeat that intention. It is more reasonable to suppose that the intention was to benefit the family of *Anund* by obliging the wife to adopt a son of *Tarachurn* than by giving the estate absolutely to *Tarachurn* on his attaining majority. Their Lordships are of opinion that the proper construction of

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the will is that it provided for the management of the property on the death of *Kali Churn*, and gave power to his widow to adopt under certain limitations; that on his death his widow *Matangini* became entitled to his estate, and on her death the Plaintiffs became entitled. This was the opinion of the High Court, which made a decree accordingly, reversing the decree of the First Court. That Court had ordered the costs of *Tarachurn* and another Defendant *Ram Krishna Nuskur* to be paid out of the estate of *Kali Churn*, but the High Court ordered those Defendants to pay the Plaintiffs's costs in the High Court and also in the First Court, and the other Defendants to bear their own costs in all Courts. Their Lordships think that the costs of all parties in the appeals to the High Court and in the First Court should be paid out of the estate of *Kali Churn*, and they will humbly advise Her Majesty to vary the decree of the High Court accordingly, and in all other respects to affirm it. This variation ought not to make any difference in the order as to the costs of this appeal, and the Appellant will pay the costs of it.

Solicitors for the Appellant: *Barrow & Rogers.*
Solicitors for the Respondents: *T. L. Wilson & Co.*

Reported also ILR 17 Cal 234 [illegible]

NAWAB SULTAN MARIAM BEGUM AND ANOTHER . . . . . } DEFENDANTS

AND

NAWAB SAHIB MIRZA AND ANOTHER . . PLAINTIFFS;

AND

NAWAB WAZIR BEGUM . . . . . DEFENDANT;

AND

NAWAB SAHIB MIRZA AND ANOTHER . . PLAINTIFFS.

J. C.* 1889 May 9; June 22.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Construction—Contract—Issue and Heirs—Treaty between Sovereign Powers—Perpetual Pension.

By deed in 1838 the King of *Oudh* declared his intention to provide pensions for various members of his family including *M. J.* and her son, and to their heirs in perpetuity.

By treaty in 1842 between the King and the Government of *India* an additional pension was provided for *M. J.* and her heirs:—

Held, that the words "issue" and "heirs" having been used in the deed as convertible terms the intention of the King must be construed to be that on the death of any pensioner leaving issue, his heirs according to the Mohamedan law of inheritance should receive payment of the pension in the proportion regulated by that law.

Held, further, that by the treaty of 1842 the devolution of *M. J.*'s pension was not to be altered, and accordingly the rules of Mahomedan law must be observed.

A grant of pensions in perpetuity, though invalid by the ordinary Mahomedan law, takes effect under a treaty between sovereign powers.

APPEAL from a decree of the Judicial Commissioner (Feb. 11, 1886).

The Respondents were Plaintiffs in the Court below, which was that of the District Judge of *Lucknow*.

The Defendants were the Appellants, *Sultan Mariam Begum* and *Amir Jehan Begum*, and their niece, *Nawab Wazir Begum*.

The District Judge, on the 4th of March, 1885, dismissed the suit of the Respondents against the three Defendants.

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

[illegible]

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On the appeal of the Respondents, and the cross appeal of the first Appellants, the Appellant *Wazir Begum* not appealing, the Judicial Commissioner on the 11th February, 1886, decreed the relief prayed with a slight exception.

The principal question which arose between the parties was, whether, in construing the terms of an otherwise undisputed settlement, made by *Muhammad Ali Shah*, then King of *Oudh*, in 1842, in favour of his queen, *Malka Jahan Sahiba*, and her issue, the word "issue" should be construed by reference to the Imameeah or Shiah law of inheritance which gives males double the share of females, as the Respondents contended, or by reference, as the first Appellants contended, to a law relating to endowments which was said to put all issue being in the same degree of remoteness on an equality as to partition.

The District Judge held that the Plaintiffs and the three Defendants were all equally entitled. He held that there was no absolute gift to *Malka Jehan*, and gave the reasons following:—

"It appears to me that there are words indicating a plain intention on the part of *Muhammad Ali Shah* to benefit his children. The transaction is neither a gift nor a will, it is a wakf or appropriation by which the principal was tied up and the fruit given away. The rights of the parties depend on the intention of the original settlor, and are not based on inheritance." He added that in the absence of any special directions to the parties "equality of partition must take place without reference to sex or proximity and that there no grounds for applying the doctrine of hajb (exclusion) where the law of inheritance does not apply."

The Respondents appealed from the District Judge's decision to the Court of the Judicial Commissioner on, in effect, the ground that the ordinary Shiah law should be applied, and that such application would wholly exclude *Wazir Begum*, and would reduce the shares of the first Appellants to one half of those of the Respondents.

The said Appellants filed objections in the nature of a cross-appeal, by which they contended that the First Court should, "according to the Mahomedan law governing the Shiah sect," have held that *Wazir Begum* was excluded.

The Judicial Commissioner allowed the Respondents' appeal so far that he declared and decreed that *Wazir Begum* was entitled to nothing, and that the Respondents were entitled each to one-third, and the first Appellants each to one-sixth of the interest in question, *i.e.*, to such shares as the ordinary Shiah law of inheritance would have given them respectively.

The grounds of the judgment in favour of the Respondents' contention were in effect that the correspondence which passed in 1842 between the King and the Government, and the arrangements then entered into, constituted a trust as to the interest of the 12 lacs of rupees then lent by the King to the *East India Company* in favour of *Malka Jehan* and her issue; and that, having regard to that correspondence, and its relation to the "deed of engagement of 1838," the words "her issue" in the documents of 1842 must be read as meaning "the heirs of her body;" and that it was inconceivable that "the King, a Mussalman of a day, when the laws and institutions of the country were Mahomedan, should have intended to designate his wife's direct heirs otherwise than relatively to the provisions of the Mahomedan law."

Cowie, Q.C., and *C. W. Arathoon*, for the first Appellants, contended that the rights of the parties were not governed by the ordinary law of Mahomedan inheritance, but by the intention of the King of *Oudh* as disclosed in the documents of 1838 and 1842. The King did not specify that the male issue of *Nawab Malka Jehan* should take a greater share than her female issue. By the true construction of those documents the two Respondents and the two first Appellants were entitled to equal shares under the Mahomedan law relating to grants or appropriations of this kind. The Judicial Commissioner was wrong in construing the words "her issue" to mean "the heirs of her body." The King did not intend to designate his wife's heirs relatively to the provisions of the Mahomedan law of inheritance. Reference was made to Baillie's Mahomedan Law, vol. i. pp. 570, 571, and *Ameer Ali's* Tagore Law Lectures, 1884, pp. 400, 401, 397, 398, 399, and 317. The Court below was right in holding that the other Appellant *Wazir Begum* was not entitled to any share,

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the grant being specified to be nazlan bad nazlan and batn bad batn, *i.e.*, generation after generation and womb after womb.

Sir *Horace Davey*, Q.C., and *Mayne*, for *Wazir Begum*, the Appellant in the second appeal, contended that the *corpus* of the fund never belonged to *Nawab Malka Jehan* by force of the documents in question. It did not form part of her estate at her death. Consequently the question who should take at her death must not be determined by the law of inheritance, but by the true construction of the words of gift. The King expressly abstained from the use of the term "heirs" and substituted therefor "issue" and "offspring." That shewed his desire to exclude the ordinary law of inheritance and the operation of the rule by which the nearer exclude the more remote descendants. All the offspring were to participate equally. [Reference was made to Baillie, vol. ii., ch. "wakf," pp. 211, 212, 217, 221.]

Doyne (*Rigby*, Q.C., with him), for the Respondents, contended that the Court below was right in holding that the word "issue," used with regard to the right of succession to the interest of the fund in question, was equivalent to the words "heirs of the body." Also that the relative rights of male heirs to share that interest was governed by the ordinary law of the family. The King's intention, collected from the two documents in question, was that the right to this pension should descend to *Malka Jehan's* heirs according to the ordinary Mohamedan law. As regards the passages at pp. 217 and 221 of *Baillie*, relied upon by the District Judge and the Appellants, it was submitted that what they meant was this. That where a Mahomedan founder or settlor expressed in his deed of wakf a clear intention to benefit certain designated classes or persons, those classes or persons will take such benefit, although by the ordinary law of inheritance they or some of them would have been excluded. There was, however, nothing in those passages or in the Mahomedan law to rebut the natural presumption that where a Mahomedan grantor uses a general expression, as in this case, to indicate the order of succession, he intends that it should be interpreted by

reference to the ordinary law which governs his family. That ordinary law was the Shiah law. If the contention of the Appellant *Wazir Begum* were adopted the result would be to let in the equal rights of the thirteen children of the three Appellants with those of the Respondent *Mirza Bahadur*, and so to divide the interest into seventeen equal shares.

Cowie, Q.C., and *Mayne*, replied.

June 22. The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

The facts of this case, as well as the origin and nature of the suit, are fully set forth by the Judicial Commissioner. It is sufficient for the present purpose to state that in the latter part of the year 1841 *Mahomed Ali Shah*, the then King of *Oudh*, was, under circumstances to which it is not now necessary to advert, induced by the late Sir *John* (then Colonel) *Low*, the Political Resident at *Lucknow*, to subscribe the sum of 12 lacs of rupees to the 5 per cent. Government loan which was then open. The money was paid into the Resident's treasury, and brought to the credit of the Government of *India*.

On the 21st of January, 1842, a letter from the King, dated 21st Zikad 1257 Hejira, corresponding with the 4th of January, 1842, and addressed to the Governor General, was forwarded by the Resident to the Secretary to the Government of *India*. The letter was, after the usual compliments, in the following terms :—

"Being fully convinced that your Lordship has always entertained a sincere friendship for me, I without any ceremony mention to your Lordship that at the time when the guarantee of the 3rd Ramzan, 1254 Hijri (corresponding with the 22nd of November, 1838), regarding the pension of the ladies of my royal family, children, and other relations, was concluded, the trifling sum of Rs.400 per month was assigned to *Malka Jahan Hamidai Sultan, Fakhruzzamani Nawab Tajunnissa Begum*. Owing to the smallness and insufficiency of the amount invested, as I have always entertained a particular regard for her and in every way endeavoured to promote her honour and comfort, I now entertain the hope from your Lordship's kindness that, instead of issuing a

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promissory note in the name of *Malka Jahan* for the sum of 12,00,000 rupees, which was totally lodged by me in the residency treasury, your Lordship will receive that money into the Company's treasury as a separate loan, for which he and the future Residents will pay 5 per cent. per annum interest, or Rs.5000 monthly, as long as the present public 5 per cent. loan shall exist, and that, when this loan shall have been paid off, that Colonel *Low* and the Residents for the time being will, after taking receipt in the same manner as prescribed for the allowance mentioned in the said deed, pay to her and to her issue, generation after generation, and womb after womb, the interest at the rate of 5 per cent. per annum, *i.e.*, Rs.5000 a month, so long as 5 per cent. interest may be allowed, and afterwards such reduced interest as may be paid from time to time by the British Government. My sole object in making this request is to prevent the risk that might otherwise occur of *Nawab Malka Jahan* or her offspring being persuaded at some future period by evil advisers to sell the note and squander the money. The accomplishment of this object will be highly gratifying to me, and will demonstrate to the public your Lordship's friendship and regard for me; this will prevent any new guarantee being entered into, but will merely be the payment of a larger sum in interest instead of a small one."

The Governor General, by letter sent through the Resident and addressed to the King, assented to his request, stating that he was pleased and gratified beyond limit in concurring with the hearty desire and wishes of the king in regard to the fixing of the stipend of *Malka Jahan*. From that time until the time of her death on the 9th of July, 1881, the stipend was paid to her in accordance with the terms of the arrangement between the Government of *India* and the King. *Malka Jahan* at the time of her death left two grandsons, the Respondents in both these appeals, two granddaughters, *Sultan Mariam Begum* and *Nawab Amir Jahan Begum*, the Appellants in one of the appeals, and a great granddaughter, *Nawab Wazir Begum*, the daughter of a deceased grandson, the Appellant in the other appeal, her surviving; such deceased grandson being a son of *Mirza Humayun Bukt*, a son of *Malka Jahan*, who died in his mother's lifetime.

The question in these appeals is what is the proper construction of the King's letter of 1842, read as it ought to be in conjunction with the deed of the 22nd of November, 1838, referred to therein and to be found in the second volume of *Aitchison's* Treaties and Engagements, ed. 1876, p. 144.

By the latter of these documents it was the intention of the King to provide pensions or stipends for the ladies of his royal family, children, and other relations, including amongst others *Malka Jahan* and her son *Mirza Humayun Bukt*, the grandfather of the Appellant *Nawab Wazir Begum*, and father of the other Appellants and of the Respondents.

By the 3rd article it was stipulated that the pension should be paid to the several pensioners specified therein and to their heirs in perpetuity on their receipts under their seals, and by the 4th article, that if any of the pensioners should die without issue, his or her pension should revert to the King of *Oudh*.

By article 6, it was provided that the said pensioners and after them their issue who on their decease should succeed to their respective pensions should always experience the special favour and kindness of the British Government. It should be observed that in that article the favour and protection of the Government is bespoken not for all the issue but merely for the issue who should succeed to the pensions. In the deed of 1838, the words "heirs" and "issue" are used as convertible or equivalent terms, so that in that document the word "heirs" must mean heirs who are issue and "issue" must mean issue who are heirs.

Their Lordships are of opinion that it was the intention of the King that in the event of the death of any of the pensioners leaving issue his or her heirs, according to the Mahomedan law of inheritance, should receive payment of the pension in the proportions regulated by such law of inheritance.

Their Lordships concur with the Judicial Commissioner in the opinion that the King intended in 1842 to provide an additional pension for *Malka Jahan* of the same nature as that which he had provided for her in the year 1838, and that after her death, provided she should leave issue, it should be paid to such of her issue as should be her heirs according to the rules of the Mahomedan law of inheritance. There is nothing in the King's letter of 1842

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to lead to the inference that he intended by the increase of the pension of *Malka Jahan* to benefit any other persons than those who were to be benefited upon her death by the pension of 1838. It seems unreasonable to suppose that he intended that the several pensions of *Malka Jahan* and of her son which were created by the deed of 1838 should, if they should die leaving issue, be paid to their respective heirs according to the Mahomedan law of inheritance, and that the pension of *Malka Jahan* created in 1842 should be paid to her issue so as to allow a granddaughter of her son to take an equal share with his sons and daughters, ignoring altogether the policy of the Mahomedan law of descent. Some effect ought to be given to the last words of the King's letter of 1842, wherein he says, "this"—(meaning the assent of the Governor General to his request, or to use the King's own words, "the accomplishment of this object")—"will prevent the necessity of any new guarantee being entered into, but will merely be the payment of a larger sum in interest instead of a small one."

The guarantee of the Government in the deed of 1838 was to pay the interest to the pensioners and their heirs if they should die leaving issue, and consequently a new guarantee would have been necessary if the intention was that the interest of the new loan should be paid to the issue of *Malka Jahan*, whether heirs or not. This appears to be almost conclusive that the word "issue" in the letter of 1842 was used in the sense of heirs of the body, and that such of the issue of *Malka Jahan* as would be her heirs according to the Mahomedan rule of descent ought alone to receive payment of the pension in the proportions assigned to them by that law.

It should be remarked, that although a settlement in the terms of the King's letter of 1842 creating pensions in perpetuity could not under the Mahomedan law be validly made by a private individual, the arrangement of 1842 takes effect as a contract or treaty between two sovereign powers.

For the above reasons, their Lordships will humbly advise Her Majesty that the decree of the Judicial Commissioner, except so far as it relates to costs, ought to be affirmed. Considering, however, that the Lower Courts differed in opinion, and that the

ambiguity in the words used by the King in his letter of 1842 has led to the litigation, their Lordships will humbly advise Her Majesty to vary the decree of the Judicial Commissioner as to costs, and to order that the costs of all the parties in the Lower Courts be paid out of the pension which is the subject-matter of the suit.

Their Lordships order that the costs of the Appellants and of the Respondents of the appeals to Her Majesty in Council be paid out of the same fund.

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Solicitors for First Appellants: *T. L. Wilson & Co.*
Solicitor for Second Appellant: *William Buttle.*
Solicitors for Respondents: *Wrentmore & Swinhoe.*

Reported also 14 R 17 Cal 283 311

HAIDAR ALI KHAN . . . . . PLAINTIFF;

AND

NAWAB ALI KHAN (AND BY REVIVOR NAUSHAD ALI) . . . . . DEFENDANT.

J. C.* 1889 July 17, 18.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Oudh Estates Act, 1869—*Sanad—Grant of Absolute Beneficial Interest.*

Held, that the Defendant was entitled as proprietor to the lands included in his sanad, not having been by agreement or otherwise clothed with any trust as regards the same.

APPEAL from a decree of the Judicial Commissioner (June 10, 1885), affirming a decree of the District Judge of *Lucknow* (March 14, 1884), which dismissed the Appellant's suit.

14 R 17 Cal 447 (14 R 17 Bom 54)

The question in the appeal was whether the Courts below rightly held that the Appellant was precluded from obtaining the relief sought by him, or any portion of it, or from obtaining any relief at all in this suit, by reason of the Defendant, *Nawab Ali*, holding a sanad under the *Oudh Estates Act* (I. of 1869), by which talukdari rights over the lands the subject of this suit were granted to him.

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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The Appellant's case was that the property, the subject-matter of the suit, consisted partly of ancestral lands, and partly of lands acquired by himself. That, as the result of an arrangement between the members of his family, the kabuliat or engagement for the lands, included in lists A and B was, during the Government of the King of *Oudh*, entered into in the name of *Nawab Ali* as proprietor, and that, upon the annexation of *Oudh* by the British Government, the same course was followed, and the summary settlement of the lands was made with *Nawab Ali*, and thereafter a sanad in respect of the taluka was granted by the British Government on the 25th day of October, 1860, to *Nawab Ali*.

The Appellant in his plaint contended that all the aforesaid transactions whereby the property stood in the name of *Nawab Ali*, were simply nominal, and that the property had always remained in his own possession, and that he had enjoyed the profits thereof, and had alone managed the property as the proprietor thereof; that *Nawab Ali* had held only forty-three bigahs of land in the said estate which were granted to him as his sir, or maintenance land, and which had stood at first in the name of *Nawab Ali's* father, and afterwards in the name of his brother; and that the *Nawab Ali* had from time to time admitted the Appellant's proprietary right, possession and enjoyment of profits, and had since obtaining the sanad from the British Government repeatedly admitted the Appellant's right to proprietary possession, and had allowed the Appellant to continue for more than twenty years in "possession and enjoyment of the entire property without obstruction and dispute, and in enjoyment of the profits thereof."

The Appellant further alleged that *Nawab Ali* had on the 20th day of June, 1881, forcibly dispossessed him of the said taluka, and the Appellant prayed, amongst other things, that a decree might be made awarding to him possession of the said taluka, including both such portion thereof as he alleged to be ancestral, and such portions thereof as were subsequently acquired as well before as after the said summary settlement, together with costs, interest, and further and other relief.

In his evidence the Appellant relied on a certain wajibularz

of the main village of the taluka, which he contended contained admissions of his beneficial interest.

The District Judge dismissed the suit, and the Judicial Commissioner dismissed the appeal. The latter pointed out that the suit was substantially one seeking a declaration that no estate had been conferred by Government on the talukdar, and that the entire transaction was a mere fiction.

He held firstly—That the confiscation, restoration, and subsequent grant of the estate could not be viewed in this light, but that the sanad gave to *Nawab Ali* the absolute legal title to the estate.

Secondly—That the wajibularz contained no admission by *Nawab Ali* that his title was fictitious, and that his uncle was the rightful owner of the estate.

Thirdly—That there was no good evidence that the Appellant was ever in possession of the estate as proprietor, either before or after the annexation of *Oudh*, but that there was, on the other hand, ample evidence on the record that the estate was managed on behalf of the said sheik, *Mardan Ali*, and his son, *Nawab Ali*, by the Appellant and his son, *Mansab Ali*, who had very extensive powers in the absence of *Nawab Ali*, who lived for the most part with his uncle, the talukdar of *Jehangirabad*.

Fifthly—That the Appellant had failed to prove his case, which from the outset was utterly improbable, or to make good his claim to any part of the property in suit.

Doyne, for the Appellant.

Cowie, Q.C., and *Branson*, for the Respondent.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Their Lordships are of opinion that the decree of the Judicial Commissioner ought to be affirmed.

There is nothing in this case to shew that the Defendant by any agreement, or by any arrangement, or other means, became clothed with any trust as regards the lands included in the sanad. The case, therefore, does not fall within the decisions

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of *Mussto Thukrain Sookraj Koer* v. *The Government* (1) or of *Hurdeo Buksh* v. *Jowahir Singh* (2). The Defendant is, therefore, entitled as proprietor to the lands included in the sanad.

A question has been raised with regard to the lands included in Schedule C. As to those the Plaintiff has claimed a proprietary right. If he had claimed a sub-proprietary right the Defendant might have given evidence to shew that he was not entitled to any such right. Their Lordships, however, think that in affirming the decree it ought to be without prejudice to any claim which the Plaintiff may have to under-proprietary rights in respect of the property included in Schedule C.

Their Lordships will humbly advise Her Majesty to this effect, and that the appeal should be dismissed.

The Appellant must pay the costs of it.

Solicitors for the Appellant: *Barrow & Rogers.*

Solicitors for the Respondent: *Watkins & Lattey.*

J. C.* 1889 May 30; July 20.

MUSSAMMAT SUNDAR . . . . . PLAINTIFF;

AND

MUSSAMMAT PARBATI . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Law—Partition between Widows—Right to Partition in respect of Joint Possession—Adoption of a Sister's Son.

Where Hindu widows are in lawful possession of the property of their deceased husband, they have an estate or interest therein in respect of their possession, notwithstanding that under an adoption or a will by the deceased a preferable title thereto may exist.

Such estate being joint is also partible and either widow may maintain a suit for partition.

Semble, the adoption of a sister's son is invalid.

APPEAL from two decrees of the High Court (June 12, 1885), reversing a decree of the Subordinate Judge of *Saharanpur* (Feb. 27, 1884), and dismissing the Appellant's suit.

Present.—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 14 Moore's Ind. Ap. 112.

(2) Law Rep. 6 Ind. Ap. 161.

The appeal related to the right to possession, and partition, between the present Appellant and Respondent (two Hindu widows of a certain *Baldeo Sahai* deceased), of certain moveable and immoveable property which had been devised and bequeathed by him to one *Praimsukh*, his sister's son, whom he had previously adopted, and who had died, a minor, shortly after the decease of the said *Baldeo Sahai*.

The judgment of the High Court (*Petheram*, C.J.) was as follows:—

"The Plaintiff says, in effect, that *Baldeo Sahai* left the estate. At the time of his death he left an adopted son as his heir. Plaintiff and Defendant took possession of the estate of *Baldeo Sahai* on behalf of *Praimsukh*, the adopted son, who was a minor. The minor died a year after. Since then, the Plaintiff and Defendant remained in joint possession of the estate. Now the Defendant is dealing with the property in a way to which she (the Plaintiff) objects, and she says, divide the estate between us.

"The Defendant pleads that *Praimsukh* was not an adopted son of *Baldeo Sahai*, nor could he be adopted. The disputed property was acquired by him under a will executed by *Baldeo Sahai*. The Plaintiff has no right in respect of the property in suit, and her claim in respect of it should be dismissed. The parties went to trial upon the question of adoption, and in proving that *Baldeo Sahai* had adopted the minor *Praimsukh* as his son, it was proved that the minor *Praimsukh* was the son of *Baldeo Sahai's* sister. It is not necessary for us to consider the evidence as to the fact of adoption. The question is, had the adoption of his sister's son by *Baldeo Sahai* any legal validity. *Baldeo Sahai* himself had doubts about its validity. That will would not have been necessary had the adoption been a good one.

"We have then to consider what was the position of the two ladies on *Baldeo Sahai's* death. A form of adoption had been gone through and a will made. *Praimsukh* was entitled to the same interest, either under the will or by reason of adoption. Whoever got possession of the estate, got it on behalf of *Praimsukh*. Both the ladies state that they maintained and brought up *Praimsukh*. They got their names registered as mothers of *Praimsukh*

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"During the lifetime of *Praimsukh*, then, the two ladies were in possession of this minor's property, whom they recognised as their son. The result of this is that they constituted themselves trustees for the minor.

"As such they continued to be in possession of the property till the death of the minor in December, 1879.

"After the death of the minor, the two ladies continued in possession of the estate. They placed themselves in the position of his mothers, and as heiresses to him and not as the widows of *Baldeo Sahai*. That is the right which both claimed in the property, and upon the basis of which they remained in possession of the estate since the death of *Praimsukh*.

"Two contentions have been raised before us. The first one is that the two widows are actually heirs, that the adoption was legal and valid, and that *Praimsukh* was therefore the son of *Baldeo Sahai* and his two widows.

"The question then is, can a Brahmin (for the parties to this suit are Brahmins) in this country validly adopt his sister's son. It is urged that the earlier authorities in Hindu law do not prohibit such an adoption; that the view taken by the two Mimansas is opposed to these earlier authorities, and that the ancient texts upon which the Mimansas profess to base their view do not support that view. It is admitted that all the Courts have hitherto adopted the view which the Mimansas take; but it is urged that as the view taken by the Mimansas is wrong, the decisions based upon it are wrong also. I do not propose to re-open the question. All the Courts have acted upon the view taken by the two Mimansas, and we are bound to follow the authority of a long and uniform course of decisions which have followed that view. Sitting as a Division Bench of this Court, it is not competent for us to disturb the long and uniform course of decisions by all our Courts from the earliest times upon this point. If the Respondent wishes to re-open the whole question, she must go to the Privy Council. It must therefore be held that the adoption of *Praimsukh* was invalid, and that upon the death of *Baldeo Sahai* he took the estate under the will.

"The question then arises—What is the position occupied by the two ladies since *Praimsukh's* death? They had no right

under mothership. They took possession of the estate on behalf of *Praimsukh*, and their possession was that of trustees on behalf of *Praimsukh*. They remained in possession as his heiresses, and as such, set up a claim to his estate. That claim has failed.

"It is then contended that even allowing that they have no right to the property as the heiresses of *Praimsukh*, still, inasmuch as they are in possession of the estate, they are competent to maintain a suit for the partition of the estate between themselves. Various authorities have been cited in support of this contention.

The first case cited to us was the case of *Armory* v. *Delamirie* (1). We were also referred to some of the cases mentioned in the note to this case.

"Now, in the first case, the plaintiff, who was a chimney-sweeper's boy, had found a jewel. He carried it to the defendant's shop, and delivered it into the hands of defendant's apprentice. The apprentice, under the pretence of weighing it, took out the stones and returned the empty socket without the stones. In an action for trover by the plaintiff, it was held in this case that the finder of a jewel, though he does not, by such finding, acquire an absolute property or ownership, yet he has such property as will enable him to keep it against all but the rightful owner.

"Now in that case no false claim was set up. The claim was a claim to have possession.

"The other case cited to us, *Asher* v. *Whitlock* (2), is a case relating to land.

"In that case a person had enclosed, from the waste of a manor, a piece of land by the side of the highway, in 1842. In 1850, he inclosed more land adjoining and built a cottage. He occupied the whole till his death in 1860. By his will this person devised all his property to his wife, for and during so much of her natural life as she might remain unmarried, and from and after her decease or second marriage, whichever event might first happen, to his only daughter in fee.

"After the death of this person his widow remained in possession with the daughter, and in 1861 married the defendant.

(1) Smith's L. C., vol. i., p. 385. (2) Law Rep. 1 Q. B. 1.

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Early in 1863 the daughter died, and the mother also died soon after. The defendant continued to occupy the property, and the heir-at-law of the daughter brought this suit for ejectment against him. It was held in that case that a person in possession of land without other title has a devisable interest, and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot shew title or possession in any one prior to the testator. Possession is a good title against all the world except the person who can shew a better title. By reason of his possession, such person has an interest which can be sold or devised. If this person had devised his interest to two persons, they might divide it among themselves.

"In this case there is nothing of the kind. Parties come and claim an estate to which they are not entitled. They set up a false claim. They have no estate in law which they could divide. We cannot recognise such claim. To do so would be to recognise an illegal transaction, and we would be dividing an estate which has no legal existence. The suit is not maintainable. We must allow this appeal and dismiss the connected appeal No. 55 of 1884. This appeal is decreed, and the other appeal (No. 55 of 1884) on behalf of *Mussamat Sundar* is accordingly dismissed. No costs on either side in any of the Courts."

Raikes, for the Appellant, contended that, being in possession, she had a good title against all persons except the right heirs of *Praimsukh*, and could maintain an action for separate possession and partition against the Respondent. He referred to *Asher* v. *Whitlock* (1); *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (2); *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (3).

The Respondent did not appear.

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The judgment of their Lordships was delivered by

LORD WATSON:—

In this case the Subordinate Judge of *Saharanpur* and the High Court for the *North-Western Provinces*, though arriving at

(1) Law Rep. 1 Q. B. 1. (2) Ind. L. R. 6 Bomb. 215.
(3) Ind. L. R. 8 Bomb. 371.

different results, did not differ as to the facts, which may be shortly stated.

The Appellant is the junior and the Respondent the senior widow of *Baldeo Sahai*, a Hindu zemindar who died without issue in the year 1878. The deceased had formerly adopted a boy named *Praimsukh*, who was his sister's son, and, possibly because he entertained doubts as to the validity of the adoption, he made a will on the 5th of July, 1875, by which, subject to provisions for the maintenance of his mother and of his widows, who are the parties to this suit, he bequeathed his whole estate of every description to *Praimsukh*, "whom I have brought up and educated as my son from his infancy, and have made my heir and successor."

Praimsukh survived the testator, and died in minority and unmarried in December, 1879. On the death of *Baldeo Sahai* the two widows assumed the possession and management of his whole estates, moveable and immoveable, for behoof of his minor heir, and their names were put upon the register as being the mothers of *Praimsukh*. After the death of *Praimsukh*, as found by the Subordinate Judge, "they obtained possession of the zemindari estates and other immoveable and moveable properties, and they described themselves sometimes as the widows of *Baldeo Sahai* and sometimes as mothers of *Praimsukh*." It is obvious that, if the adoption of *Praimsukh* was not valid according to the principles of Hindu law, neither of the parties to this case could have any right of succession to him; and, on the assumption that he was legally adopted, it is equally clear that, the estates having passed to *Praimsukh* under his adoptive father's will, they could not on his decease pass to the present litigants as widows of *Baldeo Sahai*.

No question is raised in this case with respect to the zemindari estates, which are registered in the joint names of the widows, the Respondent, as the senior, being lambardar. A dispute arose between them as to possession of the family residence, gold and silver ornaments, and other articles of value, which they submitted to arbitration, the result being that, on the 15th of July, 1880, the arbiters issued an award, being in substance a decree of partition, in virtue of which each of the widows has

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since been in possession of her separate share of the subjects then in controversy. In consequence of fresh disagreements this suit was instituted by the Appellant, in May, 1883, for partition and separate possession of house property which does not form part of the zemindari, and also of certain moveable effects which were not included in the arbitration.

Of the issues framed by the Subordinate Judge, the only one which it is now necessary to consider is the sixth, which is in these terms: "Has the Plaintiff a right to have the property in dispute divided in equal shares as she claims?" The learned Judge answered that question in the affirmative, and gave the Appellant a decree of partition, but his decision was reversed on appeal by the High Court for the *North-Western Provinces*, consisting of *Petheram*, C.J., and *Brodhurst*, J., who gave judgment dismissing the suit. The carefully framed and articulate decree of the Subordinate Judge does not appear to be in any respect erroneous, if the Appellant has a right to insist upon partition being made.

The Subordinate Judge purposely abstained from expressing any opinion either as to the validity of the adoption of his sister's son by *Baldeo Sahai*, or as to the efficacy of his will to carry the estates to *Praimsukh*, if not duly adopted, who in that case would not be an heir of the testator. He considered it unnecessary to determine either point until the estates are claimed by a kinsman of *Praimsukh's* paternal line, or by a reversioner or collateral heir of *Baldeo Sahai*. He held that, in all questions *inter se*, both widows were estopped by their own previous acts and admissions from alleging the invalidity of *Praimsukh's* adoption; and, on that footing, their respective rights and interests being of precisely the same quality, he was of opinion that neither of them was in a position to resist a demand for partition.

The Chief Justice, in whose judgment *Brodhurst*, J., substantially concurred, was of opinion that the adoption of his sister's son by *Baldeo Sahai*, who was admittedly a Brahmin, was altogether invalid, the adoption of a child whose mother he could not have lawfully married being contrary to the text of the Mimansas, and also to a course of decisions in the Indian Courts.

The Chief Justice then deals with the present Appellant's alternative contention (which was the same with that submitted here) to the effect that, inasmuch as the widows "are in possession of the estate, they are competent to maintain a suit for the partition of the estate between themselves." He refers to the well known case of *Armory* v. *Delamirie* (1), where it was ruled that the finder of a jewel, though he does not acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and therefore to maintain trover; and also to the case of *Asher* v. *Whitlock* (2), in which it was held that a person in possession of land without other title has a devisable interest, and that the heir of his devisee can maintain ejectment against any person who has entered upon the land and cannot connect himself with some one having title or possession prior to the testator. The Chief Justice thus states the result of these authorities: "Possession is a good title against all the world except the person who can shew a better title. By reason of his possession such person has an interest which can be sold or devised." But he thus proceeds to distinguish these cases from the present. "In this case," he says, "there is nothing of the kind. Parties come and claim an estate to which they are not entitled. They set up a false claim. They have no estate in law which they could divide. To do so would be to recognise an illegal transaction, and we would be dividing an estate which has no legal existence."

If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahmin cannot lawfully adopt his own sister's son. But apart from that question, and also from any question touching the legal effect of *Baldeo Sahai's* will, the fact of joint possession by the two widows of the estates which belonged to the testator, ever since the death of *Praimsukh* in 1879, appears to them to be sufficient for disposing of this suit in favour of the Appellant. Their Lordships are at a loss to understand, at all events to appreciate, the grounds upon which the Chief Justice endeavours to differentiate between the authorities which he cites, the import of which he correctly states,

(1) 1 Smith, L. C. 385. (2) Law Rep. 1 Q. B. 1.

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and the position of the parties to this action. Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of *Praimsukh* or of *Baldeo Sahai*, one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them. It is impossible to hold that a joint estate is not also partible; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be reversed, and that of the Subordinate Judge restored. The Respondent must pay the costs of this appeal.

Solicitors for Appellant: *Barrow & Rogers.*

Reported dis 14 R 17 Cal 347

MUNGNIRAM MARWARI AND ANOTHER . DEFENDANTS; J. C.*

AND 1889

MOHUNT GURSAHAI NUND . . . . PLAINTIFF. July 18, 19, 20.

AND

SYED LIAKUT HOSSEIN. . . . . DEFENDANT;

AND

MOHUNT GURSAHAI NUND . . . . PLAINTIFF.

Followed 14 R 19 Bom 577 - 23 All 68.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Guardian—Act XL. of 1858, *s.* 3—*Effect of Order for a Certificate.*

Held, that according to the true construction of sect. 3 of Act XL. of 1858, a person who has obtained an order for a certificate thereunder is a properly constituted guardian, notwithstanding that no formal certificate in pursuance of such order has been obtained.

APPEAL from two decrees of the High Court (Feb. 22, 1886) reversing two decrees of the Subordinate Judge of *Bhagulpore*, which dismissed the Respondent's suit. 14 R 12 Cal 542

The facts are stated in the judgment of their Lordships. The question was, whether the proceedings which led to the execution sale complained of were wholly ineffectual, on the ground that the Defendant thereto was a minor, and not represented by any properly constituted guardian.

Cited 14 R 17 Cal 946

Doyne, for the first Appellants, contended that the Defendant to the primary suit, that is the above Respondent, was sufficiently represented by *Jitlal*, and was finally concluded by the proceedings in question. The evidence shewed that he was more than eighteen years old at the death of *Hurri Pershad* in 1875, and was therefore not within sect. 3 of Act XL. of 1858. Besides, on attaining twenty-one years, he ratified the acts of *Jitlal* done as guardian. If a minor, he was properly represented, for although *Jitlal* had no actual certificate, he had an order of Court granting a certificate under which he could at any time, if necessary, take out a certificate which would bear the same

Distinguished 14 R 22 Bom 404 - 23 - 179 - 21 All 159 14 R 16 Cal 357

Referred to 9 R 15 Bom 570 - 26 Bom 117

* *Present*:—LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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date as the order. Reference was made to *Stephen* v. *Stephen* (1); *Chunee Mull Johary* v. *Brojonath Roy Chowdhry* (2); *Harisaran Moitra* v. *Bhubaneswari Debi* (3).

C. W. Arathoon, for the second Appellant, referred to *Girish Chunder Chowdhry* v. *Abdul Selam* (4), which overruled *Stephen* v. *Stephen* (1) and approved the ruling in *Chunee Mull's Case* (2).

Mayne, for the Respondent, contended that the Respondent was not properly represented by guardian in the primary suit, and that therefore the decree in that suit and all proceedings in execution thereof were null and void against him. Reference was made to Civil Procedure Code, sect. 443; Act XL. of 1858, sect. 3; Act VII. of 1870, 1st sched. art. 10. [SIR BARNES PEACOCK :—Ought not the Respondent to have appealed against the judgment, or have applied to set it aside? How was a purchaser to know there was no certificate? Besides, the Court Fees Act was passed long after the Act of 1858, and cannot be used to construe it.] The order granting a certificate was sufficient to constitute a guardian, but he could not sue or be sued without a formal certificate. Under the circumstances the decree against the Respondent was a nullity, and the purchaser under it took no title. *Stephen* v. *Stephen* does not apply. See *Doorga Persad* v. *Kesho Persad Singh* (5); *Durga Churn Shaha* v. *Nilmoney Dass* (6). Reference was then made to *Vishnu Keshav* v. *Ramchandra Bháskar* (7), and the cases there cited: *Vasudev Vishnu* v. *Narayan Jagannath* (8); *Jatha Naik* v. *Venktapa* (9); *Mrinomoyi Dabia* v. *Jogodishuri Dabia* (10). At any rate, if the decree were not a nullity, the Respondent was entitled to sue to set it aside within a year after attaining majority, *i.e.* after the 20th of December, 1882. Reference was also made to *Gregory* v. *Molesworth* (11); *Hoghton* v. *Fiddey* (12).

(1) Ind. L. R. 8 Calc. 714; 9 Calc. 901.
(2) Ind. L. R. 8 Calc. 967.
(3) Law Rep. 15 Ind. Ap. 195.
(4) Ind. L. R. 14 Calc. 55.
(5) Law Rep. 9 Ind. Ap. 27.
(6) Ind. L. R. 10 Calc. 134.
(7) Ind. L. R. 11 Bomb. 130.
(8) 9 Bomb. H. C. R. 289.
(9) Ind. L. R. 5 Bomb. 14.
(10) Ind. L. R. 5 Calc. 450.
(11) 3 Atkyns, 626.
(12) Law Rep. 18 Eq. 573.

Doyne replied.

July 20. The judgment of their Lordships was delivered by SIR RICHARD COUCH:—

In this case the Plaintiff, the present mohunt of a muth called *Bela Sheottur*, seeks to obtain possession of certain properties, and for a declaration that the decree and auction sale under which the Defendants in the two suits became the purchasers of the properties are not binding upon him, as he was a minor, and was not properly represented in the suit in which the decree was obtained. He is the successor in the mohuntship of one *Hurri Pershad Nund*, who in the years 1873 and 1875 borrowed money of the Defendant in one of the suits, *Mungniram Marwari*, and executed mortgages of the properties which are now claimed by the Plaintiff. *Hurri Pershad*, on the 28th of September, 1875, appointed the Plaintiff to be his successor (the terms of the appointment will be referred to), and died on the following day. On the 24th of November, 1875, *Jitlal Nund*, the brother of *Hurri Pershad*, applied to the District Judge of *Bhagulpore* for a certificate of guardianship of the person and property of the Plaintiff under Act XL. of 1858, and on the 19th of February, 1876, the application was allowed, after opposition on the part of one *Somar Nund*. The terms of the application and of the allowance are these: The application stated that *Hurri Pershad* had in his lifetime given the guddi of mohuntship to *Mohunt Garsahai Nund*, the present Plaintiff, his youngest disciple, of about thirteen years of age; and after stating the vesting in possession of the muth and other properties, it said that it was necessary, in order to take care of the person of the minor and to look after all the cases and manage the properties, that the Petitioner, that is *Jitlal Nund*, should obtain a certificate under Act XL of 1858; and it prayed for a certificate. The order of the District Judge, after stating the application, and that it had been objected to by a disciple, a chela, who claimed to have succeeded *Hurri Pershad*, and that the certificate of guardianship would be only as regards the personal property of the minor, "whatever that property may be at present," said "Order; application allowed."

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On the 7th of November, 1876, *Mungniram*, the Defendant in one of the suits, instituted a suit on his mortgage bonds against the Plaintiff, and in the plaint he described the present Plaintiff as "minor, disciple and heir of *Mohunt Hurri Pershad Nund*, deceased, under the guardianship of his uncle *Jitlal Nund*." In this suit a summons was served on *Jitlal Nund* personally, but he did not appear, and made no defence to the suit; and on the 16th of January, 1877, *Mungniram* obtained an *ex parte* decree declaring his lien upon the mortgage property, and directing it to be sold. In execution of that decree *Mungniram* caused the property to be attached, and it was put up for sale by auction; and *Mungniram* became the purchaser of *Bela Sheottur*, part of the property taken in execution, and the Defendant in the other suit, *Liakut Hossein*, purchased mouzah *Bichwa*, the other part.

On the 18th of August, 1882, the Plaintiff instituted the present suits, alleging that he attained his majority in January, 1880. The first question to be considered is whether he was properly represented in the suit by *Mungniram* by his guardian *Jitlal;* and that depends on the construction of Act XL. of 1858. That Act in the 3rd section says:—"Every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin, or otherwise, may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate?" The question is, what is the meaning of the words "until he shall have obtained such certificate?" Although the order was made allowing the application for the certificate, no formal certificate appears to have ever been prepared by the officer of the Court, and issued to *Jitlal Nund*. The Subordinate Judge found that although *Jitlal Nund* did not take out the certificate, he was the constituted guardian of the Plaintiff, but that he did not properly look after the interests of the Plaintiff, and did not defend the suit. On that account he held that the decree in the suit was not binding upon the Plaintiff, but he thought that the suit was barred by the law of limitation, and decided the case upon that ground.

Then it came by appeal to the High Court. That Court, after noticing some cases which had been quoted, said: "There is not, so far as we are aware, any authority for holding that a person who has applied for a certificate of guardianship under Act XL. of 1858, and who has been appointed guardian by the Court, can, as of right, sue or defend on behalf of the minor without taking out a certificate;" and they went on to state what is material as shewing the nature of the case, that *Jitlal Nund* had acted for the Plaintiff, not only in this suit by *Mungniram*, but that he acted in suits by other creditors, and in proceedings taken by certain of the chelas to establish title to the office of the mohunt; and further, that after the Plaintiff attained his majority, he presented a petition to the Court of the Subordinate Judge, in which he stated that *Jitlal* had obtained a certificate of guardianship under the Act "and had been managing his estate; and on the 6th of July, 1881, he (the Plaintiff) was examined as a witness, and stated that *Jitlal* had been his guardian, and used to do all his business." So that it appears that *Jitlal* had, at all events, although the certificate had not been issued, acted as the guardian of the Plaintiff. The High Court then decided against the Plaintiff, dismissing the appeal with costs. However, they entertained a petition for review, and upon that petition came to the conclusion that they had not put the right construction upon the Act. The ground of this conclusion appears to be that the *Court Fees Act*, which was passed in 1870, contains this provision: "Except in the Courts hereinbefore mentioned no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited, or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules;" and they considered, as they say, that the certificate could not actually come into existence "until the person who has the permission of the Court to obtain it, deposits the requisite amount of stamp duty." They reversed their previous judgment, and held that the Plaintiff ought to have a decree for possession and for mesne profits, on the ground that he had not been properly represented by *Jitlal* in the suit.

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Now the words are "until he shall have obtained such certificate." The section provides that the person who claims a right to have charge of the property may apply to the Civil Court for a certificate. The Court is to exercise a discretion, or at least is to inquire whether the person making the application is entitled to have the certificate. Their Lordships are of opinion that when the Court makes that inquiry, and comes to a decision that the application should be allowed, that is doing all that is substantially necessary in the matter; and when the order is made that the applicant shall have his certificate, the applicant really then obtains his certificate. All is done at that time which is necessary to shew that he is the person who should have the certificate. He then, by getting that order, substantially obtains the certificate, although the officer of the Court, whose duty it would be to draw up the certificate, and prepare it for the signature of the Judge, or the seal of the Court to be attached to it, may not do that for some time afterwards, on account of the course of business, or the party not applying to him for it. When a man obtains an order for a certificate he does in substance comply with the terms of this Act, in the same way as when a person has the judgment of the Court that he shall have a decree in his suit it may be said that he then obtains his decree. The decree, when it is drawn up afterwards, relates back to that time; and so would the certificate in this case relate back; and the terms of the Act that he shall have obtained such certificate are complied with.

The High Court give as a reason, as has been stated, that the *Court Fees Act*, which was passed twelve years after the Act of 1858, shews that the obtaining the certificate is not complete until the fee is paid, and the certificate is actually issued. The answer to this is that it must be seen what was the intention of the Legislature when the Act of 1858 was passed, and when there was apparently no such provision as this in existence requiring the Court fee to be paid before the certificate was issued. If the meaning of the Act in 1858 was that the obtaining the certificate was complied with by obtaining the order, any subsequent provision in the *Court Fees Act* could not make any difference in the intention of the Legislature. Their Lordships have to see what

the intention was, and what was meant by these words when the Act was passed in 1858. Therefore they have come to the conclusion that the Act was sufficiently complied with by *Jitlal* obtaining the order from the Judge, although the certificate was never actually afterwards drawn up. What means there might be under the *Court Fees Act* to oblige the person who had obtained such an order to take out the certificate it is not necessary now to consider. Probably, if there is not power now to oblige the fee to be paid, it would be for the Legislature to make a provision for it.

The Plaintiff being thus properly represented in the suit, the other question which arises, and which has to be determined before considering any other matters or questions which arise in the case, is when did the Plaintiff attain his majority? It is not disputed by his learned counsel that the present suits are suits in the nature of one to set aside a decree, and that such a suit must be brought, according to the law of limitation, within one year from the making of the decree, if the party at that time is of full age, but if he is a minor, then within one year of his attaining majority. The plaint in this suit was filed on the 18th of August, 1882, and the question is whether the Plaintiff had attained his majority more than one year before that time. That depends upon the date of his birth; and the Subordinate Judge who had that question to try upon the second issue, finds this. He says:—"With regard to the second issue, the Plaintiff states in the plaint that he was born in December, 1861, and that he attained majority in January, 1880, that is, when he completed his age of eighteen years. On the other hand, the Defendants contend that he was twenty-five when he brought the suits. The Plaintiff was examined as a witness in another case on the 6th of July, 1881, when he had no idea of bringing these suits, and he then stated his age to be twenty-four years, and distinctly said that he was a minor up to 1879, that is until he completed the age of twenty-one. In the present case he has not ventured to come into the box and explain away his previous statement, He has sedulously kept himself out of Court, and though in the course of the trial the Court remarked that it would be satisfactory if the Plaintiff himself was examined, his legal advisers

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have not thought proper to examine him." The statement which is referred to is a deposition which he made on the 6th of July, 1881, in some suit, the nature of which does not appear, and in that deposition there is this statement:—"My name is *Gursahai Nund*, father's name *Mohunt Hurri Pershad*, age twenty-four years." Mr. *Mayne* has urged upon their Lordships that the heading of a deposition of this kind is not of much importance; that the statement of the age by a witness is taken down in such a way that little weight ought to be attached to it. The answer to that seems to be that if the Plaintiff made this statement without considering what his age was, or made it in a loose and informal manner, he might have come forward as a witness, or been produced as a witness by his legal advisers and explained it. He might have shewn how it was that he came to allow his age to be put down at twenty-four years, when, according to his present case, he was some three or four years younger at that time, and would be nineteen or twenty. The Subordinate Judge has properly attached considerable importance to that. He then goes on to say that he does not attach weight to the evidence which was given on the part of the Plaintiff. Some of it, he says, and justly, is hearsay evidence, and he thinks that the evidence of the mother, and of the other persons who give any evidence on the subject, is not to be given credit to. The conclusion he came to was that the Plaintiff was born in 1265 Fusli, and that he attained his majority when he completed twenty-one years of age, and more than a year before the suit was commenced. The difference between the eighteen years and the twenty-one years has been adverted to in the course of the argument, and it has been said, and it may be with some justice, that the Plaintiff may have supposed, when he talked of majority, that it was eighteen. This difference is explained by the operation of the Act of 1858; because, when a minor is brought under the operation of that Act, which the Plaintiff was by the certificate, the age of majority is altered from eighteen to twenty-one, and therefore it became necessary to shew that the age of twenty-one years was attained.

Besides what the Subordinate Judge has referred to, some observations arise upon the evidence in this case with regard to

the law of limitation. The hibanama throws some light upon the matter. That states:—"I am *Mohunt Gossain Hurri Pershad*, inhabitant and proprietor of *Monzoh* muth *Bela Sheottur*, pergunnah *Bisthazari*, lying within the jurisdiction of station *Sikundara*, sub-division *Jamui*, zillah *Monghyr*. Whereas life is uncertain, and out of old disciples no one is intelligent and clever enough to discharge and manage the zemindari, village, and court affairs, and the affairs relating to my guddi of mohuntship, for this reason I, of my own free will and accord in health of body, and in a sound state of mind, have out of my disciples appointed a new disciple by name *Gursahai Nund*, who is competent to manage the zemindari, village, and court affairs, as the holder of the estate to be left, and the guddi of mohuntship, and successor to my dignity and possession, in order that after my decease he shall take possession of my guddi of mohuntship, and succeed to my dignity and possession, the moveable and immoveable properties, and household furniture detailed below." Therefore, according to the Plaintiff's case, we have *Hurri Pershad* saying that no one is intelligent and clever enough out of his old disciples to discharge and manage the zemindari, and appointing a youth at that time only thirteen years of age. It seems unlikely that *Hurri Pershad*, if the Plaintiff was only of that age would have used such language as this in the hibanama. He might do it if the Plaintiff were just upon the point of attaining his majority of eighteen. Again, it is somewhat strange that *Hurri Pershad*, considering that he said not one of the old disciples was intelligent and clever enough to manage the zemindari, when he appointed a youth of thirteen, made no provision for the appointment of a guardian. There is no suggestion that the Plaintiff was a minor. The terms of this hibanama appear to their Lordships not to be consistent with the case of the Plaintiff, although they may be consistent with the case of the Defendants, that at that time the Plaintiff was very nearly attaining the age of eighteen, when he would be of full age if no certificate of administration had been obtained, which it would not be necessary then to apply for.

Another fact against the Plaintiff's case is this: that an application was made for the return of documents, which was presented

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by a pleader; and in that application the Plaintiff is made to state, or states—it is made through his pleader, and we may use the expression "made to state"—"I have attained my majority since 1880, and have been personally transacting my own affairs." Upon that application, after a report was made to the Judge by the record keeper, an order was made that the documents should be returned on the petitioner having attained his majority. The pleader who was employed to present the petition was examined as a witness, and he appears to have done what was quite right—to have asked to see the Petitioner, and saw him; he says that the Plaintiff on that occasion told him that he had attained majority. It is suggested that the Plaintiff had then in his mind the age of eighteen, but it is not to be supposed that the pleader, who no doubt was acquainted with the law, did not consider that the proper age to be attained was twenty-one; and certainly a Judge whose duty it was to see that the Plaintiff was entitled to have back the documents would have to consider whether it was true or not that he had attained his majority. That supports the conclusion to which the Subordinate Judge came when he decided the issue against the Plaintiff, and there is certainly no reason for their Lordships thinking that this conclusion is wrong.

That being so, it is not necessary to consider the other question which was raised by Mr. *Mayne*, whether as regards *Mungniram*, he being the Plaintiff in the original suit, and being shewn by the evidence to have known the whole state of the property, that it was "debuttur" property, and that *Hurri Pershad* had no right to mortgage it, and knowing also that the suit which he brought to recover the money was undefended, and that *Jitlal* was grossly neglecting his duty in not defending it, and raising the question that the estate which had come to the Plaintiff as the mohunt, was not liable to satisfy *Mungniram's* debt, the decree obtained by *Mungniram* against the present Plaintiff represented by *Jitlal* was not binding upon him by reason of the gross laches of *Jitlal*.

The result is that their Lordships will humbly advise Her Majesty that the decrees of the High Court made upon the review should be reversed, and both suits be dismissed with

costs in the Subordinate Court and in the High Court, including the costs of the review. This conclusion was correctly arrived at by the Subordinate Judge, and by the High Court upon the first hearing of the appeals, although not upon the same grounds as those upon which the judgment is now given. The Appellants must respectively have their costs of these appeals.

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Solicitors for the first Appellants: *Barrow & Rogers.*
Solicitor for the second Appellant: *S. G. Stevens.*
Solicitors for the Respondents: *T. L. Wilson & Co.*

SHEIKH MUHUMMAD MUMTAZ AHMAD AND OTHERS . . . . . } PLAINTIFFS;

AND

ZUBAIDA JAN AND OTHERS . . . . . DEFENDANTS.

J. C.* 1889 *May* 16, 17, 21, 23; *July* 6.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WEST PROVINCES OF BENGAL.

Mahomedan Law—Mushaá—Vulidity of Gift followed by Possession.

Whether a gift of undivided property (mushaá) is valid or not under Mahomedan law, possession given and taken under such gift effectually transfers the property.

A declaration by the donor in the deed of gift that possession has been given binds the heirs of the donor; and possession once taken cannot be invalidated by any subsequent change of possession.

APPEAL from a decree of the High Court (June 22, 1885) reversing a decree of the Subordinate Judge of *Mainpuri* (May 1, 1884) and dismissing the appellants' suit with costs.

The facts are stated in the judgment of their Lordships.

Graham, Q.C., and *Doyne*, for the Appellants, contended that they were entitled to the relief prayed. The deed of sale which they sought to enforce was executed by *Usman* after the *Transfer of Property Act* (IV. of 1882, s. 54) had come into force. The deed recited payment of the consideration money. *Usman* admitted before the registrar the receipt of Rs.7500, and took payment of

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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the balance in presence of the registrar. Indorsement was made as required; see *Registration Act* (III of 1877), sects. 58, 59, 60. Here was a *primâ facie* case against the executant of the deed which had not been rebutted by sufficient evidence. Even if no more than the balance, Rs.2500, had been proved to be paid, that would be sufficient to sustain the sale.

A transfer of a right to recover property is none the less a transfer because the transferor is out of possession: Macnaghten's Mahomedan Law, Precedents of Sale, p. 168. If the contract is one in respect of which the purchase-money is to be paid at a future date, there is a good sale and the purchaser's right may be transferred: Hedaya—Sale. The moment possession is given there is a transfer of the property. That principle applies to the gift by *Himayat*, which being followed by possession was an operative transaction whether valid or not as a gift without possession.

Branson, for the first six Respondents, contended that according to the concurrent findings of the Courts below the Appellants had failed to establish a foundation for the relief prayed. The non-payment of the Rs.7500 was alone a ground for dismissing the suit. See *Rajah Sahib Perhlad Sein* v. *Budhoo Singh* (1), which deals with circumstances in which you cannot have a transfer of possession, and the effect where the whole of the price had not been paid, and where the transaction was incomplete. As to the right to specific performance, and whether the whole consideration ought to have been paid; see *Ranee Bhobosoonderee Dasseah* v. *Issurchunder Dutt* (2); *Kali Das Mullick* v. *Kanhya Lal* (3). The deed of gift by *Himayat* was executed with full knowledge and was valid to pass the subject of it to her daughter the donee, no possession having been given under it, and no question ought to have been raised. Her intention was *bonâ fide*, her act *intra vires*, and she always upheld what she had done. Transfer of possession is not necessary when the gift is by a parent to a child. See *Ameeroonissa* v. *Abedoonissa* (4).

(1) 12 Moore's Ind. Ap. 306, 311; S. C. 2 Beng. L. R. P. C. 111, 117.
(2) 11 Beng. L. R. 36: 18 Suth. W. R. 140.
(3) Law Rep. 11 Ind. Ap. 218.
(4) Law Rep. 2 Ind. Ap. 87.

Graham, Q.C., replied.

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The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The Appellants, who were Plaintiffs in the suit, claim as purchasers of three-fourths of a share in an estate to which they alleged that *Mahomed Usman* had succeeded by descent from *Himayat Fatma*. The first two Appellants claimed as direct purchasers from *Usman*, and the third as a sub-purchaser.

The estate originally belonged to *Chaudri Hafiz Hussain*, who died in 1865 without leaving male issue. After his death his widow, *Himayat Fatma*, and his daughter *Zahur Fatma*, by an award made with their mutual consent, obtained proprietary possession of the property in equal shares, and *Chaudri Ahmad Hussain*, husband of *Zahur Fatma*, was entrusted with the management.

The Plaintiffs in their plaint (paragraph 4) alleged that upon the death of *Himayat Fatma*, in the beginning of 1882, *Mahomed Usman* became her heir, and that according to the distribution of shares under the Mahomedan law, *Usman* got 229 out of 390 sihams, and the heirs of *Zahur*, who died in December, 1879, in her mother's lifetime, got 161 sihams; that out of his right *Usman* sold three fourths, amounting to 171¾ sihams, to the plaintiffs, *Mumtaz Ahmad* and *Firasat Hussain*, and *Sahib Ali Khan* for Rs.10,000 on the 16th of December, 1882, and received the consideration money and got the deed registered; and that on the 3rd of May, 1883, *Sahib Ali Khan* sold his interest to the Appellant *Sheikh Irshad Hussain* under a sale deed. They charged that the daughters, the grandson, and the son-in-law of *Ahmad Hussain* had entered into collusion with *Usman*, and interfered with their possession, and prayed that they might be put into possession of the claimed property, being 171¾ out of 390 sihams of the property detailed in the plaint, by proving the sale deeds of the 16th of December, 1882, and 3rd of May, 1883, and setting aside the proceedings of the Revenue Court. They alleged that their cause of action accrued on the 4th of January, 1882, the date of the death of *Himayat Fatma*, and they valued their claim at Rs.10,000, the amount of consideration.

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Usman was made a *pro formâ* Defendant.

The case of the first six Defendants, Respondents, was that the sale deed by *Usman* had been obtained by fraud without the payment or receipt of the consideration money only for the purpose of carrying on litigation, and further that *Usman* had no right to the property, inasmuch as *Himayat Fatma* had executed a deed of gift of her share to her daughter, *Zahur Fatma*, under which the latter had obtained possession.

Usman in his written statement said, "The Plaintiffs obtained the sale deed from the Defendant by fraud. They got him to acknowledge before the sub-registrar the receipt of Rs.7500 without paying the same to him, and the Rs.2500 which they had paid to him was taken back by them after registration on the pretence that they would use it in meeting the costs of suit," and in paragraph 5 he stated that "*Sahib Ali Khan*, who is brother of Defendant's wife, has, for fear of losing the good opinion of the brotherhood, sold his share for Rs.100 to *Irshad Hussain*."

The important issues of fact were,—

1st. Was the consideration for the sale by *Usman* paid, and was the sum of Rs.2500 paid at the time of registration taken back or not?

2nd. Did the deed of gift in favour of *Zahur Fatma* become null and void, and was possession held in accordance therewith?

4th. Did *Usman* inherit the estate of *Himayat Fatma*, or had she no right left to her at the time of her death?

The Subordinate Judge of *Mainpuri*, before whom the case was tried in the first instance, found upon the first issue that the Rs.7500 were not paid, but that the Rs.2500 paid at the time of registration were not taken back. Upon the second issue, he found that the deed of gift in favour of *Zahur Fatma* was a fictitious document and was null and void. He said in the first place the gift was made in respect of an undivided property. The detail of the properties given at the foot of the plaint shews that some of them are joint. Such a gift is invalid under the Mahomedan law. Secondly, according to Mahomedan law the delivery of actual possession is necessary. But in the present case the donor was in possession of all the properties, and the

donee died before she could obtain possession of them. He then gave his reasons for considering that *Himayat Fatma* continued in possession.

The result was that, the Subordinate Judge, considering that only one fourth part of the alleged consideration for the sale by *Usman* had been paid, gave a decree for the Plaintiffs for one fourth of the property claimed in the plaint.

From that decision the Plaintiffs appealed to the High Court, for amongst others the following reasons:—

1st. Because the finding of the lower Court that Rs.7500 out of the consideration was not paid by the Plaintiffs was against the weight of the evidence.

4th. Because it being shewn that the deed of sale was delivered to the Plaintiffs, and that a portion of the consideration had been paid by the Appellants, the whole claim ought to have been decreed.

The first six Defendants appealed to the High Court, for, amongst others, the following reasons:—

1st. Because the lower Court has erred in holding that the deed of gift, dated the 12th of February, 1879, was not valid, under the Mahomedan law, by reason of "*mushaá.*"

2nd. Because the Subordinate Judge's finding, that the gift in question was not followed by delivery of possession in favour of the donee, is against the weight of evidence, which proves that the gift was duly carried out on behalf of the donor while the donee was alive, and that the gift took full effect with the consent and free will of *Himayat Fatma*, the donor.

3rd. Because it is established by sufficient evidence that the donor, on the demise of the donee, in confirmation of the gift, caused *Ahmad Hussain*, the husband of the donee, to be placed in possession of the whole of the property previously conveyed by gift to *Mussammat Zahur Fatma*, the deceased donee.

4th. Because the finding of the lower Court against the validity of mutation of names, subsequently effected in favour of the husband of the deceased donee, is not

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correct; while the remarks made by the Subordinate Judge, as to the absence of the formalities of a proper transfer, are not well founded.

6th. Because the payment of Rs.2500, being a portion of the consideration money of the sale deed set up by the Respondents, is not proved by the evidence on the record, and the finding of the Court below to the contrary is not correct.

Upon the appeal of the Plaintiffs the High Court held that the Plaintiffs' statement that the Rs.7500 were paid to *Usman* was false, and that the Defendants' statement that the Rs.2500 were returned was also false. They gave their reasons for disbelieving the payment of the Rs.7500, but they did not examine the evidence as to the return of the Rs.2500, notwithstanding the Defendants' sixth ground of appeal, in which they said that the payment of the Rs.2500 was not proved by the evidence on the record; nor did they give any reason for the conclusion at which they arrived that the Defendants' statement as to the return of that amount was false. Even as to the non-payment of the Rs.7500, they very much modify their opinion in a subsequent part of the judgment of the Chief Justice, wherein he says, "It appears to me that we cannot in this Court say that the Subordinate Judge who tried the question of fact decided it wrongly. It is not necessary for us to say whether, supposing the case to have come before us in the first instance, we should have arrived at the same conclusion; it is sufficient to say that we do not feel called upon to interfere with the decision he has passed." Mr. Justice *Tyrrell* concurred with the Chief Justice, and the appeal was dismissed with costs. Here then was a decision which, unless reversed by Her Majesty in Council, would be conclusive in any future proceeding between the parties to the suit, including *Usman* and the purchasers, as to the non-payment of the Rs.7500, and the non-return of the Rs.2500. Their Lordships are now called upon to reverse the decision, and they are obliged to deal with the question, at least as to the non-return of the Rs.2500, without having the benefit of the reasons of the High Court with reference to it. This is unsatisfactory, and at variance with the rule of Her Majesty in Council,

which requires the reasons of the Judges to be transmitted to the Judicial Committee.

The judgment of the High Court upon the appeal by the first six Defendants is still more unsatisfactory. The second issue was the most important one as regards them; for the denial of the validity of the deed of gift of the 12th of February, 1879, from *Himayat* to her daughter, and of possession being taken in accordance therewith, went to the very root of their title. That issue was found against them as regards both law and fact by the Subordinate Judge. Their first four grounds of appeal to the High Court were directed to the findings of the first Court upon the second issue, and they were fairly entitled to an expression of the High Court's opinion with reference to those four grounds of appeal. Yet the High Court, in their judgment upon that appeal, have left the findings of the first Court upon the second issue wholly unnoticed, and, without awarding to the Defendants the costs of their appeal, have dismissed the suit upon a mere subsidiary point not taken by the Defendants in their grounds of appeal, viz., the Plaintiff's failure to establish their right to stand in the place of *Usman* by reason of the non-payment of the Rs.7500. To use the words of the Chief Justice, the High Court decided the case upon that ground only, and decided nothing as to the merits, notwithstanding the opinion expressed by the Chief Justice that future litigation is likely to arise between the parties, a misfortune much more likely to be promoted than averted by abstaining from deciding the case upon the merits. Their Lordships therefore consider it to be their duty to determine the issue as to the Defendants' title, as well as upon that which raises the subsidiary point as to the Plaintiff's right to stand in the place of *Usman*. They see no reason for the fear entertained by the Chief Justice, that if the High Court had decided the case upon the merits, and given judgment upon all the points raised by the grounds of appeal, complications could have ensued which would make it uncertain what their decision was, and create difficulties in connection with the point of *res judicata*.

Their Lordships will now proceed to express their opinion upon the four principal issues raised in the case.

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First, as to the non-payment of the Rs.7500, they concur entirely with the Subordinate Judge. It is very improbable that the purchasers would have paid Rs.7500 to *Usman* without taking any receipt or acknowledgment from him beyond the mere statement in the sale deed that the Rs.10,000 had been paid, especially as the deed itself would not have been admissible in evidence of the fact before registration. The evidence of the witnesses who were called to prove that the money was at the place named and there counted and paid to *Usman* was contradictory and very unsatisfactory. Even admitting that Rs.7500 were carried to the place named by the witnesses and there counted and ostensibly made over to *Usman*, a story which their Lordships do not believe, there is no reliable evidence as to where or from whom the money was collected, whence it was brought, or whither and by whom it was carried away after the alleged payment of it to *Usman*. Whatever weight the admission made by *Usman* before the sub-Registrar as to the receipt of the Rs.7500 might have had against himself, it was of no weight as against the other Defendants. Neither of the Plaintiffs ventured to give evidence, nor did *Usman* appear as a witness. It might have been some corroboration of the fact of the purchase by the Plaintiffs for Rs.10,000 if it had been proved that Rs.4000 were *bonâ fide* paid by the Plaintiff *Irshad Hussain* to *Sahib Ali Khan* for the one fourth share of the property which the latter had purchased from *Usman*. But there was nothing of the sort. No proof was given of any payment made by *Irshad Hussain* except the payment of Rs.100 in the presence of the sub-registrar, notwithstanding the written statement made by *Usman* that only Rs.100 were paid. The admission in the deed of sale to *Irshad Hussain* of the receipt of the whole of the alleged purchase-money of Rs.4000 is subject to the same remarks as those already made as to the admission by *Usman* of the receipt of the Rs.7500 and Rs.2500.

As to the non-return of the Rs.2500, their Lordships cannot concur with the Subordinate Judge. He gives no sufficient reason for disbelieving the evidence of *Fazlul Rahman*. All he says upon that subject is, "he" (meaning *Usman*) "has examined only one witness, *Fazlul Rahman*, but what reliance can be placed

on him, and how can it be believed that the Defendant took the money at the time of registration, and afterwards returned it?" It is not very clear that the money, although the sub-Registrar was led to believe that *Usman* had received it in his presence, ever actually passed out of the control of those who brought it. *Usman* might, no doubt, have led the sub-registrar to suppose that the Rs.2500 which are said to have been there counted were placed under his control, notwithstanding a secret arrangement that the money should remain under the control of and be carried away by those who brought it. This is not very incredible when *Usman's* acknowledgment as to the receipt of the Rs.7500 is disbelieved. No explanation is given why Rs.2500, and Rs.2500 only, of the Rs.10,000 stated in the deed as the consideration should be actually paid when *Usman* made a false statement as to the Rs.7500.

Fazlul Rahman, whom their Lordships see no reason to disbelieve, says: "I know *Muhammad Usman* and *Mumtaz Ahmad*. *Muhammad Usman* did not get the consideration money of the sale deed from *Mumtaz Ahmad* and others, in whose favour he executed it. I know this because I went with *Sahib Ali Khan*, my uncle, at the time of registration. When I went to the tehsil I saw *Badulla*, the servant of *Sahib Ali Khan*, and *Nunhey Khan*, the servant of *Ali Ahmad*, carrying the money in bags. I heard that there were Rs.2500. *Mumtaz Ahmad* and *Sahib Ali Khan* went inside, in presence of the registrar. I heard the sound of the money being counted. After registration *Muhammad Usman*, *Sahib Ali Khan* and *Mumtaz Ahmad* came away. The money was with the same persons who carried it to the tehsil. These persons first took the money to the tehsil treasurer, and asked him to receive it on account of revenue due from *Sahib Ali Khan* and *Ali Ahmad*. I was present at that time. The treasurer said that the treasury was closed that day, and the money could not be received. These persons then went with the money to the house of *Firasat Hussain*, and *Sahib Ali Khan* and I came to the house of *Muhammad Haji*, where we had put up. The servant of *Firasat Hussain* came at ten o'clock on the following day, and asked to have the money deposited in the tehsil. *Sahib Ali Khan* and I both came to the house of *Firasat Hussain*,

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and stayed there for a short time. *Sahib Ali Khan, Mumtaz Ahmad,* and I then went to the tehsil, the money being carried by the same persons. Some was received on account of revenue due from *Sahib Ali Khan,* and some on account of revenue due from *Ali Ahmad. Mumtaz Ahmad* is the brother of *Ali Ahmad.*"

As to the second issue. The Subordinate Judge has found that the deed of gift of the 12th of February, 1879, was a fictitious document, and was null and void. It is not very clear whether he meant by the word "fictitious" that the deed was executed without the knowledge or consent of *Himayat Fatma.* That question is scarcely raised by the issue "Did the deed of gift become null and void, and was possession held in accordance therewith?" The finding of the Subordinate Judge on the third issue seems to assume that the deed was executed. Be this as it may, however, their Lordships see no reason to distrust the report of the Commissioner who was deputed by the Sub-Registrar to examine the old lady, and to whom she admitted the execution. That report was dated the 22nd of February, 1879, it was believed by the sub-registrar, and upon the strength of it the deed was registered on that day.

The Subordinate Judge held that the deed was void as being a gift of undivided property. He adds that some of the properties are joint, and that such a gift is invalid under the Mahomedan law. Upon this point their Lordships would have been glad to have the opinion of the High Court. In their opinion the gift and possession taken under it transferred the property of *Himayat* to her daughter.

The opinion of the Subordinate Judge, who was a Mahomedan, must be taken in connection with his finding that the donee died before she could obtain possession; but, for the reasons given hereafter, their Lordships consider that that finding was erroneous.

The doctrine relating to gifts of mushaá was considered by this Committee in the case of *Ameeroonissa* v. *Abedoonissa* (1), and by the High Court in *Calcutta,* in *Mullick Abdool Guffoor* v. *Muleka and Others* (2). The facts of those cases differ from the present, but they throw light upon the doctrine.

(1) Law Rep. 2 Ind. Ap. 87; S. C. 23 Suth. W. R. 203.

(2) Ind. L. R. 10 Calc. 1112.

It is unnecessary for their Lordships to express an opinion as to whether the gift in question was invalid or not, for it appears that even if invalid possession given and taken under it transferred the property.

The authorities relating to gifts of mushaá have been collected and commented upon with great ability by *Syed Ameer Ali* in his *Tagore* Lectures of 1884. Their Lordships do not refer to those lectures as an authority, but the authorities referred to shew that possession taken under an invalid gift of mushaá transfers the property according to the doctrines of both the Shiah and Soonee schools, see pages 79 and 85. The doctrine relating to the invalidity of gifts of mushaá is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules.

In the course of his judgment the Subordinate Judge cursorily remarks that *Himayat* was an old lady, and was not in the proper enjoyment of her senses.

There is nothing in the evidence to shew that the latter portion of that assertion was well founded, nor was there any issue upon the subject, nor anything in the report of the Commissioner who examined her as to the execution of the deed, or in the statements of the relations who identified her, to raise an inference that she did not understand the nature and effect of the deed. There was nothing in the deed of a complicated nature or which required the exercise of any great mental powers to comprehend the meaning of it. The disposition was a probable one. The old lady and her daughter and granddaughters were living together, both mother and daughter were ill, and had been suffering from an epidemic. *Usman*, the mother's brother, was one of her heirs, and the daughter on the death of the mother would not have inherited any portion of the property, nor could the mother have devised the property to her by will. The property was small. Nothing could be more natural than that the mother should desire that in the event of her death her daughter and granddaughters, if they should survive her, should continue in the same moderate degree of comfort which they had enjoyed in her lifetime.

The lady had merely proprietary, not actual, possession of the greater portion of the property, that is to say, she was merely in

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receipt of the rents and profits. In the deed of gift she declared (an admission by which *Usman* as her heir and all persons claiming through him were bound) that she had made the donee possessor of all properties given by the deed; that she had abandoned all connection with them; and that the donee was to have complete control of every kind in respect thereof. *Ahmad Hussain*, the daughter's husband, was the general manager of both mother and daughter, and would doubtless take care that the deed of gift should be carried into effect. Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual. If possession were once taken and the deed of gift took effect no subsequent change of possession would invalidate it.

On the 24th of April, 1879, *Himayat Fatma* by special power of attorney appointed *Sheik Himayat Ali* as her general agent to present and verify a petition for mutation of names, and on the 28th a petition was accordingly presented on her behalf by *Himayat Ali*, by which, after reciting the deed of gift and that *Zahur Fatma* had been put into proprietary possession of the property, she prayed that after expunging her name from the Collectorate papers the name of *Zahur Fatma* the daughter might be entered therein. The usual proceedings were adopted, and on the 5th of June, 1879, a perwana was issued by the Assistant Collector to the tehsildar, by which he was requested amongst other things to have the petition proclaimed and to cause an inquiry as to possession to be made. This was done, and on the 27th of July the village patwari reported that *Himayat Fatma* had made a deed of gift of her own rights to her daughter *Zahur*, and that the latter had obtained possession of the same in the place of *Himayat Fatma*, her mother. On the 28th of July the tehsildar reported that he had caused the notification to be proclaimed, and that it was evident from the report of the patwari that *Zahur Fatma* had obtained possession of the property specified in the gift in the place of *Himayat Fatma*.

Notwithstanding the proclamation neither *Usman* nor any other person raised any objection to the mutation, and accordingly on the 4th of February, 1880, an order for the mutation of names was granted.

Zahur Fatma died on the 3rd of December, 1879, and *Himayat Fatma*, her mother, on the 4th of January, 1882. The order for mutation was consequently after the death of *Zahur*. Mutation of names in the Collector's office was not actually necessary to complete the transfer of possession under the deed of gift. But the order for mutation is important as shewing that no objection was made to the mutation, and that the report of the patwari made during the lifetime of *Zahur* as to the execution of the deed of gift and of the transfer of possession under it which had been adopted by the tehsildar was also adopted and acted upon by the Deputy Collector.

Their Lordships have no doubt that upon the evidence, and especially in the absence of any objection by *Usman* in the lifetime of *Zahur*, the Subordinate Judge ought to have found the second issue in favour of the Defendants, and their Lordships do so now.

The reasons of the Subordinate Judge in support of his finding that the donee died before she obtained possession are weak and unavailing. First he relies upon five decrees in suits brought in the name of *Himayat Fatma* for rent which accrued after the date of the deed of gift, and also upon one payment of revenue made in her name on the 26th of November, 1879, but the suits were commenced and the revenue paid before the mutation of names in the Collector's office at a time when actions for rent and payment of revenue would in all probability be brought and made in the name of the person entered as the proprietor in the Collector's book. A similar remark applies to the order of the Assistant Collector in January, 1880, in which he speaks of *Himayat Fatma* as the person in possession. This order, it should be remarked, was made after the reports of the patwari and of the tehsildar that *Zahur* was in possession, but before they had been adopted by the Assistant Collector and the order for mutation made. Then the Subordinate Judge makes a point of *Himayat's* continuing to occupy one of the pakka houses intended for females included in the deed of gift, as if the daughter after she had obtained possession under the deed of gift would, in order to complete her title, have turned her mother out of the premises altogether, and have refused to allow her to continue

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to occupy the house in which she had previously lived at a time when one moiety belonged to herself and the other to her daughter. Such an argument is as futile as the following one, wherein he says, "The revenue receipt is filed as No. 128, and the order as No. 136, with the record. At the first page of the deed of gift, the last pakka house intended for females is entered as occupied by the donor, who, having made a gift of it, continued to occupy it herself. How can such a gift be valid? A very strong reason to believe the gift to be false is that, if *Zahur Fatma* had become the absolute owner and acquired possession under the gift, two things must needs have happened after her death, namely, in the first place, her husband, *Ahmad Hussain*, would not have taken any proceeding tending to set aside the gift, because his object to acquire the property had been obtained. Some of the property would devolve on him, and some on his daughters, and a sixth share only would go to the mother. So he would have contended himself to take steps to acquire only that one-sixth share, and would not have troubled himself about the rest. But he did not do so. He took steps to acquire the whole property."

As though a fraudulent attempt on the part of *Ahmad Hussain* to acquire the whole property for himself instead of only a portion of it was a strong argument in the face of all the other evidence to prove that the deed of gift was false and had no existence at all. It is unnecessary to refer to the other arguments of the Subordinate Judge in support of his finding on the second issue. They are utterly valueless.

That *Ahmad Hussain* was not the honest man that the Subordinate Judge treats him to have been, who would have contented himself to take steps to acquire the sixth share which went to the mother, and would not have troubled himself about the rest, is shewn by the Plaintiffs' (Appellants') own case, for it is there said, "*Ahmad Hussain*, alleging a parole gift, without date, from *Himayat Fatma* to himself, applied seven days after his wife's death, *i.e.*, on the 10th of December, 1879, for the transfer of possession in a number of villages from *Himayat* to him in accordance with that alleged gift, and at the same time he applied, in fraud of his own daughters, for the transfer to

him, as heir of his deceased wife, of her share, and obtained various collusive and false reports from kanungoes and other native local officers, and an order, dated the 19th of November, 1880, for the registration of his own name in respect of the entire estates of *Himayat* and of *Zahur*. It is sufficient to say here, of those proceedings, that the first Court has found, and there is now, as is submitted, no question remaining, that the claims of *Ahmad Hussain* to the properties now in suit were unfounded and 'improper.'"

The Appellants rely on *Ahmad Hussain's* having, from *Himayat's* death to the time of his own death, remained in possession under an order of the 10th of November, 1880, for mutation of names, and on the first four Defendants, his daughters, having, upon his death, applied for mutation of names to themselves as his heirs; but this argument does not assist the Plaintiffs' case, for the order of the 19th of November was obtained with the assent of the daughters of *Zahur*, and subject to the following proviso. In their petition of the 4th of February, 1880, speaking of their father *Chaudri Ahmad Hussain*, they say, "*Hussaini Jan* and *Hajira Jan* having filed a petition in the tehsil of *Eta* for the entry of their names instead of that of their mother *Zahur Fatma*, and having included therein our names also, we submit that we and the objectors are five own sisters, and are the heirs and proprietors of the property of our deceased mother, and with our consent our father *Ahmad Hussain* continues, as usual, in possession of the villages, and he too is an heir of the deceased, with right of inheritance to her property. The said *Chaudhri* and we are joint, and possession by him is our possession. We therefore have no objection to his name being, during his life, entered instead of ours; but with this proviso that such arrangement be now made that our shares be saved from other claimants, and that we do not thereby ever lose our rights; and he must, during his lifetime, provide for us properly. We accordingly submit that, with the above proviso, the name of *Chaudhri Ahmad Hussain* be entered instead of ours."

Upon the whole their Lordships will humbly advise Her Majesty to reverse the decree of the Subordinate Judge and both the decrees of the High Court, to order the Plaintiffs to pay to

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all the Defendants, except the representatives of *Mahomed Usman*, who is dead, their costs in the Courts below; that a finding be entered for the Defendants on the first issue that the amount of the consideration was not paid, and that the Rs.2,500 were taken back; and upon the second issue, that the deed of gift in favour of *Zahur Fatma* was executed with the authority of *Himayat Fatma*, that possession was taken under it, and held in accordance therewith, and that the possession taken under the deed transferred the property; and that upon those findings a decree be given for the Defendants, and that it is unnecessary to record any finding upon the other issues.

The Appellants must pay the costs of the appeal to Her Majesty in Council.

Solicitors for Appellants: *Barrow & Rogers.*
Solicitor for first six Respondents: *Watkins & Lattey.*

Reported also ILR 17 Cal 223

GREGSON . . . . . PLAINTIFF; J. C.*

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RAJAH SRI SRI ADITYA DEB . . . . DEFENDANT. April 11, 12; May 14.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Act VI. of 1876—*Contract whilst under Disability—Ratification after Order of Discharge—Specific Performance.*

The Respondent, being subject to Act VI. of 1876 and thereby placed under legal disability, contracted to lease and mortgage his ancestral zemindary to the Appellant. Thereafter his estate was, whether rightly or wrongly, ordered to be released, and the Respondent, being then *sui juris*, carried on the transaction, retaining the benefit of the Respondent's payments, and exacting from him the fulfilment of his stipulations:—

Held, that the Respondent was bound by the contract, though its terms were to be ascertained by what passed when he was disabled from contracting:—

Held, further, that a suit for specific performance was the Appellant's proper remedy. Even if the contract was against the policy of the Act, the order of release was made with jurisdiction, was not open to review, and enabled the Respondent to ratify the contract.

APPEAL from a decree of the High Court (Dec. 2, 1886) reversing a decree of the Subordinate Judge of *Purulia* (May 20, 1885), and dismissing the Appellant's suit with costs.

The suit was brought by the Appellant for specific performance of an agreement whereby the Respondent agreed to accept a loan of Rs.40,000 from him, and to grant him a lease of the Respondent's zemindary for nineteen years. The original Court declared for the Plaintiff. The High Court reversed the decree, holding that the agreement was one which the Defendant was not competent to make, that no agreement was established of which specific performance could be decreed, and that in any case the alleged arrangement was not one of which the Court in the exercise of its discretion would grant specific performance.

The facts are stated in the judgment of their Lordships.

The High Court held that there was no sufficient material

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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before the Court to support a finding of any agreement concluded between the parties.

As to the Defendant's capacity to enter into the alleged agreement, the Court, after setting out the provisions of the *Incumbered Estates Acts* of 1876 and 1884, stated its views as follows:—

"Now, it is plain that the contract here relied on would be one prohibited by sect. 3 of the earlier Act. But it was argued, that though sect. 3 of the earlier Act is not in express terms modified by the later Act, it is so by necessary implication in this way: it is said that the alteration in sect. 12, enabling the revenue authorities to discharge an estate if an arrangement is made which is accepted by the creditors and approved by the Commissioner, makes it necessary to import a corresponding modification into sect. 3, to make the two sections tally with one another. It is said that we must read sub-sect. 3, clause (*c*), as invalidating contracts generally, but not contracts such as the Commissioner might properly approve under the amended sect. 12, provided he actually did so. It is not necessary to consider whether that is the true interpretation of the Act or not, because it appears to us clear that, in this case, the arrangement between the Plaintiff and the Defendant was never approved by the Commissioner in any sense or for any purpose whatever. The petition to the Commissioner, of the 5th of September, did not ask for it; it asked him to discharge the estate on the debts being paid. His first order of the 9th of September was to the effect simply, that the estate might be discharged when the debts were paid off. His letter of the 25th of September, the last letter which appears to be connected with this matter, merely says, that the debts having been satisfied, the estate might be discharged. It appears to us clear from these orders, that the Commissioner did not for a moment think that he was sanctioning any arrangement within the meaning of the new clause added to sect. 12, but that he was simply acting in accordance with the first part of sect. 12, which says that the estate should be released when the debts were satisfied. And this is precisely the thing which Mr. *Clay*, then acting as Commissioner, says in his evidence that he did. He says distinctly that he never approved or

disapproved of any arrangement either before or after the estate was discharged.

"I may add that, speaking for myself, I am quite sure that if Mr. *Clay* had been called upon to approve or disapprove of this arrangement, and had considered that approval on his part would give validity to it, he would have hesitated for a long time before giving his approval to it. This estate was at that time in the hands of the Incumbered Estates authorities for the purpose of clearing off the debts; and the policy and object of the Act is to relieve the zemindar. This was an arrangement which, instead of relieving the zemindar or his estate from debt, would leave the old debt exactly at the old figure, merely transferring the amount from one creditor to another, and adding to the existing debts of Rs.7000 odd, an additional burden of Rs.40,000.

"That disposes of the question whether the Defendant had any power to enter into this arrangement, and whether any sanction was given, which could give validity to it.

"Then there was a suggestion, that there was evidence of some subsequent matter, which might give rise to an inference that a fresh contract was entered into after the 8th of October. It was contended that the Defendant was then his own master and could do as he liked, and that, in fact, he did, by some new agreement, revive the former invalid contract. That has been spoken of by the Court below as a ratification. There are only two letters of the Defendant's bearing upon the matter. The first is of the 12th of November, speaking in general terms of the ijara settlement, and the other is of the 4th of December, in which he practically withdrew the terms. In our judgment, it is quite impossible to draw from this any inference that any fresh contract or arrangement was ever made."

The High Court then stated its reasons for holding that even if the contract was legal and fully made out it would not be proper to decree a specific performance.

It considered that a contract for a loan was not one which ought to be specifically enforced. That there were obscurities and uncertainties which by themselves would make it impossible specifically to enforce the contract, and that there were terms in

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the contract which gave rise to a similar difficulty. As regards the equity of the Plaintiff's claim the Court said:—

"Then, again, we must look to the circumstances under which this transaction took place. The Defendant was a man whose property was in the hands of officers under an Act the object of which is, as stated in the preamble, to relieve the zemindars. The whole policy of the Act is to protect men in the position of this Defendant from having their estates either taken away from them, or frittered away by incumbrances. The Defendant, according to the Plaintiff's own witnesses, is an ignorant man. The Plaintiff is an acute man of business. The arrangement, so far as Rs.7000 is concerned, would leave him much as he was before. As to the Rs.40,000, there is no evidence of any existing necessity for that loan at all, or any reason why this large indebtedness should be incurred, which would place him in a far worse position than he was in when his estate was brought under the Incumbered Estates authorities. The granting of specific performance is a matter of judicial discretion; and even if the case were one in which we could, consistently with general principles, grant specific performance, we should not be disposed to do so in a case of this description."

Sir Horace Davey, Q.C., and *Doyne*, for the Appellant, contended that the judgment of the High Court was wrong. Reference was made to Act VI. of 1876, sect. 3, and it was contended that the contract in question being one to take effect after the release of the Respondent's estate from the Incumbered Estates Department its execution did not fall within the disabilities there specified. If it did, the evidence proved a ratification of that contract after the Respondent's disability had ceased by the discharge of his estate. It was established by the evidence and admissions of the Respondent that there was a concluded agreement between the parties to the effect stated in the plaint. Even if the evidence fell short of that result the Appellant was entitled to elect to have the contract specifically performed according to what may be held to have been the true terms of it. There were no grounds for refusing specific performance as the High Court has done.

Mayne, for the Respondent, contended that the agreement evidenced by the documents of the 5th of September, 1884, was wholly null and void under Act VI. of 1876. There was no ratification after the 8th of October established by the evidence. The letters relied on for that purpose were not shewn to be genuine or to have emanated from the Respondent. Besides, a perfectly null and void contract is not in law susceptible of ratification. Nor is there any evidence of a new agreement after the 8th of October such as alleged in the plaint. Further, there is nothing in the general law of specific performance which helps the Appellant's case. There was no agreement, in fact, to be performed. It was absolutely prohibited by the Act and could not be ratified or recognised in any way. This is not a case where what is done under a statute may be void as to some purposes and not as to others, valid as regards some person and invalid as regards others. The disabilities imposed by this Act are not like those imposed by the general law on infants, they are express and for an express purpose—to clear the estate—which would be violated if, pending the management, the owner could incumber afresh. Reference was made to *In re Northumberland Avenue Hotel Company* (1). There is here no such agreement as the Court could enforce; the evidence is so vague and conflicting that it would be impossible for the Court to collect the intention of the parties; and, further than that, it related to a mortgage, i.e., to a loan which might be repaid the moment it was made: see *Rogers* v. *Challis* (2); *Sichel* v. *Mosenthal* (3); *Larios* v. *Bonany y Gurety* (4).

Counsel for the appellant were not heard in reply.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Plaintiff seeks specific performance of an agreement under very peculiar circumstances. The agreement at first oral, was afterwards reduced to writing. At that time the Defendant, who is the zemindar of *Patkum* in *Chota Nagpore*, was subject to the

(1) 33 Ch. D. 16.
(2) 27 Beav. 175.
(3) 30 Beav. 371.
(4) Law Rep. 5 P. C. 346.

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operation of Act VI. of 1876, passed to relieve the owners of incumbered estates in that district. The transactions between him and the Plaintiff were intended to release him from that restraint, and had the effect of doing so. When released he continued to deal with the Plaintiff on the footing of the agreement. And the question is whether he has thereby rendered himself liable to a decree for specific performance.

The Defendant's estate was put under management on his own application in July, 1879. He is a man in middle life and of at least average mental capacity. But during the management he was placed under legal disability, which continued until his estate was released in the year 1884. By September, 1884, his debts, which in 1879 were about Rs.26,000, were reduced to Rs.7639.

The material provisions of Act VI. of 1876, as amended by Act V. of 1884, with regard to property put under management and its owners, are as follows:—The manager is to ascertain the debts and liabilities and to schedule them, and make a scheme for discharging them out of the surplus income. While the property is under management the holder is made incapable of mortgaging, charging, leasing, or alienating the same, and of entering into any contract which may involve him in pecuniary liability. On payment of all the scheduled debts and liabilities, or if an arrangement is made for their satisfaction which is accepted by the creditors and approved by the Commissioner, the holder is to be restored to the possession and enjoyment of his property.

In the early part of the year 1884 the Plaintiff and Defendant were in negotiation for a lease of the *Patkum* estate, by the latter to the former, but it was not till the month of September that the Defendant would offer terms acceptable to the Plaintiff. On the 5th of that month the Defendant presented the following petition to Mr. *Clay*, the Deputy Commissioner in the Incumbered Estates Department:—

"Petition of *Maharaj Udoy Aditya Deb*, inhabitant of *Ichagurh*, pergunnah *Patkum*, is to the following effect:—

"For the liquidation of my debts and for the improvement of my estate, my ancestral zemindari, pergunnah *Patkum*, in zillah

Manbhoom, is under the management of the Incumbered Estates Department under Act VI. of 1876. Considering that there would be a great improvement in my zemindari if I let out the same in ijara to Mr. *C. B. Gregson*, I made a proposal to grant that ijara settlement at a rent of Rs.16,441 13*a.* 6*p.*, and to take a loan of Rs.40,000 within three months from this date for the purpose of discharging my liabilities to the mahajuns. As the aforesaid Saheb Bahadoor agreed to these proposals, so, preparing a draft of the ijara pottah, determining to grant the ijara settlement to the aforesaid Saheb for a period of nineteen years from the beginning of the present year 1291 up to the year 1309, I have been filing it along with this petition; and I pray that receiving from the aforesaid Saheb Bahadoor the amount of my liabilities in the account of the Incumbered Estates, you will kindly pass an order for releasing the mehal from the management under Act VI. On the release of the aforesaid mehal from the Incumbered Estates management, I shall properly grant the pottah and receive the kabulyat according to the draft filed along with it, and separately execute registered bonds, and receive Rs.15,000 for the present. The money that will be deposited by the aforesaid Saheb Bahadoor in the Incumbered Estates Department shall be credited against the rent of the ijara mehal for the present year. If on the release of the mehal I delay the granting of the ijara, then the aforesaid Saheb Bahadoor shall be able to take possession of the aforesaid mehal in ijara right and to get the pottah executed according to the draft filed along with it. As the property is under the control of the Incumbered Estates Department, I am now incompetent to grant the aforesaid settlement. I therefore pray that your worship will release the aforesaid mehal from the control of the Incumbered Estates Department. The ijara pottah and kabulyat will have to be executed on stamped papers, and at that time I shall enter the boundaries in the same. At present a draft only being prepared, is filed along with this petition.

"The 21st Bhadro, 1291.

"*Maharaj Udoy Aditya Deb.*"

The draft lease filed with the petition specified a number of

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particulars with respect both to the loan of Rs.40,000 and to the demised property, and to the payments by the lessee, which it is not necessary now to mention. And it contained the following stipulation:—"Except the land fit for indigo cultivation you shall not be able to take any settlement or ijara of any lands within the ijara mehal from any tenants, and especially from *Birinchi Narain*, and if you take it I shall not be bound by this pottah."

Tne draft lease was communicated to the Plaintiff, who on the 9th of September objected that it omitted certain stipulations relating to limestone and to iron smelters. On this point there is dispute between the parties. It is not of any great importance, nor if it were decided against the Plaintiff would it impair his right to have the rest of the agreement performed. The High Court have expressed no opinion which of the parties is right on this point. The Sub-Judge has found in favour of the Plaintiff, and no reason for disputing his opinion has been assigned.

On the 10th of September the Plaintiff paid into the Collectorate Treasury the sum of Rs.7639 5*a*. 10*p*., and got a receipt as follows:—

By whom brought.	On what account.	Amount.
		R. A. P.
Mr. C. B. Gregson. Through Anund Chunder Roy.	On the proposal to take an ijara of pergunnah *Patkum*, according to the prayer of the zemindar of the aforesaid pergunnah, and under the order of the Commissioner, deposited on account of (illegible) estate for the purpose of releasing the aforesaid mehal from the control of the encumbered estates	7,639 5 10
		7,639 5 10
	Total Rs.7,639. 5. 10.	

"Examined and entered.

"*T. Chatterji*, Accountant,

"(Illegible) *Singh*, Treasurer."

On the 15th of September the sub-manager reported to the Deputy Commissioner as follows:—

"Dated *Purulia*,
"the 15th September, 1884.

"Sir,—I have the honour to report for your information that Mr. *Gregson* having deposited Rs.7639. 5*a*. 10*p*. for releasing the *Patkum* encumbered estate from attachment under Act VI. of 1876, all the scheduled debts have been paid off, and that from the balance still at credit of the estate, the law charges and other management charges still due by that estate can be easily paid. It is therefore not necessary to apply for Commissioner's sanction to release of the estate."

The Deputy Commissioner however thought that it was necessary to obtain the Commissioner's sanction, and he applied for it on the same day, stating the circumstances as stated to him by the sub-manager. The formal order for release, which is not in the record, was not made until the 8th of October.

It is contended by the Plaintiff that on and after the 15th of September the Defendant was freed from the operation of the Act, and that in the whole of his subsequent action with reference to the agreement he must be taken to have been *sui juris*. So far as regards the question whether the agreement has been validated or called into action so as to bind the Defendant, their Lordships think it makes little difference which of the two dates is taken as the date of emancipation. But the personal position of the Defendant, bears on another portion of the case, viz., whether such an agreement as this is the proper subject of a decree for specific performance against a person so situated. The High Court have thought that it is not, and the correctness of their opinion is challenged in this appeal. Their Lordships certainly think that there is nothing in the transactions themselves to operate as a release of the estate. The scheduled debts were not paid; they were only transferred to another creditor, and the transfer was coupled with an agreement for a fresh loan by which the Defendant was loaded with debt more heavily than in 1879 when he sought the benefit of the Act. It is a matter of wonder to their Lordships that any order for release should have been

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made under such circumstances; but at all events they are clear that the Defendant was not *sui juris* until the order was made.

Returning to the narrative of transactions between the parties, we find a considerable amount of correspondence, oral and written, after the 15th of September. Each deals with the other on the footing that the agreement is valid and binding. On the 3rd of October the Defendant wrote to the Plaintiff requesting him to pay the current instalment of revenue, Rs.633. 9*a*. 8*p*., and the Plaintiff did pay that sum on the 6th. The Defendant never offered to repay that sum nor the larger sum paid to meet the scheduled debts.

On the 12th of November, five weeks after the formal release of the estate, the Defendant wrote on the subject of *Birinchi Narain*. It has been seen that in the draft lease he stipulated that the Plaintiff should not acquire *Birinchi's* interest in the property; and both the written correspondence and the oral evidence of the Plaintiff shew that he attached great importance to that matter. In point of fact the Plaintiff had received a lease from *Birinchi* before the Defendant presented his petition of the 5th of September, and the Defendant knew all about it. In his letters previous to the 8th of October he recurs more than once to the requisition that *Birinchi's* lease to the Plaintiff shall be cancelled as a condition of the Defendant executing his lease to the Plaintiff. On the 12th of November he wrote to *Anund Roy*, the Plaintiff's agent, thus:—

"If the Saheb has come back from *Calcutta*, please speak to him and get the pottah of *Birinchi Narain Aditya Babu* returned. When this is done, I will go to *Purulia*, and I shall have no objection to register it. Before this, my only condition (*lit.* objection) was that the pottah of *Birinchi Narain Aditya Babu* should be returned, and I still hold to this condition. After these matters are settled, you will write to me in reply, and on that I will go and get it registered. Settle the matter and write to me in reply.

"The 28th of Kartick, 1291."

The Plaintiff answered this on the 18th of November:—

"Yesterday I came here from *Calcutta*. The ijara settlement that was made with *Birinchi Narain Aditya Babu* has been

cancelled. I am now sending you the palki and bearers, and hope that you will without delay come to this place and finish the execution, &c."

It is not suggested that *Birinchi's* lease was not cancelled as stated in this letter.

The negotiations still went on, the Plaintiff urging performance of the agreement, the Defendant making excuses but always treating the agreement as a subsisting one. On the 30th of November he wrote to his own agent, but for the purpose of communicating with the Plaintiff, excusing himself for not having gone to *Purulia* to execute the lease, asking that the Plaintiff would come to the Defendant's residence, and adding "I will surely execute the instrument. I have no objection," with more assurances to the same effect. On the 4th of December he wrote requesting an advance of the whole loan at once, "albeit it has been arranged that the Rs.40,000 should be taken in two instalments." Not long after this the Plaintiff became convinced that the Defendant was trifling with him, and commenced the present suit.

In support of the decree of the High Court, which reversed that of the sub-Judge and dismissed the suit, Mr. *Mayne* first argued that the transactions of September were wholly void as against the Defendant; and then that what is wholly void cannot be validated. But the answer is that such an argument does not meet the facts of this case. It is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disability in such a way as to bind himself to the whole. The present Defendant has done that and more than that. Not only has he taken, and, up to the time of suit and for aught that appears till now, retained the benefit of the Plaintiff's payments, but he has since the 8th of October, 1884, exacted from the Plaintiff a part of the consideration which was to move from him. At the Defendant's instance the Plaintiff has given up the lease that he had obtained from *Birinchi Narain*, nor is it possible for the Defendant to replace the Plaintiff in his former position. The Defendant therefore is clearly bound by the contract, though its terms are to be ascertained by what passed when he was disabled from contracting.

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Then it is contended that, though the contract may be binding, specific performance is not the proper remedy, and that on two grounds. First, because it is a contract for mortgage. But it is also a contract for a lease, and the two parts are easily separable. So far as the Plaintiff is concerned, he is bound, if he asks for the lease, to grant the loan. And he is willing to do that, but he is also willing to take the lease without insisting on the loan. It is true that it would be an idle thing to compel the Defendant to receive a loan which, there being no contract to the contrary, he might repay at once, or on reasonable notice. But if he wishes to be released from that part of the contract, it will not be carried into effect by the Court.

The second reason alleged for not awarding specific performance is that the contract is against the policy of the *Incumbered Estates Act*; and on this point their Lordships confess to having felt much difficulty, owing to the very peculiar circumstances of the case. But after careful consideration they think that they must not look beyond the order of the 8th of October, 1884. They have before intimated that the order is difficult to reconcile with the policy, or indeed with the literal terms, of the Act. But *factum valet;* the commissioner was acting within his jurisdiction, and his order is not under review. By it the estate was in fact released from management; and it must be taken that its owner then became as free to manage his affairs as any other man. He has used his freedom to adopt the documents of the 5th of September, 1884, as binding on himself, and he must now be compelled to act according to their tenor.

In their Lordships' judgment the High Court should have dismissed with costs the appeal from the sub-Judge; and that decree should now be made. If the Plaintiff desires to have an account of the profits of the property during the time he has been kept out of possession, he has a right to that, he on his part accounting for the rents which would have been due from him. The Respondent must pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for Appellant: *Slaughter & Colegrave.*
Solicitors for Respondent: *T. L. Wilson & Co.*

Reported also ILR 17 Cal 291

PERTAB CHUNDER GHOSE . . . . . PLAINTIFF;

AND

MOHENDRA PURKAIT AND OTHERS . . DEFENDANTS.

J. C.
1889
May 23, 24;
June 29.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Contract—Effect of Misrepresentation—Registration Act III. of 1877, *sect.* 17, *clauses* (*b*) *and* (*h*)—*Civil Code Procedure* (1882), *ss.* 584, 585.

Reported in ILR 6 Cal 57. 70
- 25 Bom 206
- 26 Bom 622

Where tenants executed a kabuliyat containing conditions that khas possession might be resumed at will or if rents were not paid at the end of the year, on a representation to the effect that such conditions would not be enforced:—

Held, that the kabuliyat did not express the real agreement between the parties, and could not be sued upon.

Held, that an ikrar to the effect that the tenants will sign and have registered kabuliyats at rents expressed in the ikrar is not a document inadmissible for want of registration under Act III. of 1877, sect. 17, clause (b), as operating to create or declare an interest. It comes under clause (h) by creating a right to obtain another document, which when executed will create or declare an interest.

Under sects. 584 and 585 of Civil Code Procedure, 1882, an appellant must not be allowed in second appeal to question the finding of the first appellate Court upon a matter of fact.

Followed
ILR 17 All 127
(6) ILR 8 Cal 30

APPEAL from two decrees of the High Court (Jan. 27, 1887) reversing decrees of the District Judge of the 24-Pergunnahs (March 31, 1886), and dismissing the Appellant's suit with costs.

The suit was brought in the Court of the Subordinate Judge by the Appellant, a zemindar, against his tenants to recover rent cesses and interest to the amount of Rs.1640. It was founded upon a kabuliyat dated the 21st of June, 1881, alleged to have been executed by the Respondent *Rukhit Chunder Purkait* for himself and brothers and as guardian of the sons of *Abhoy Churn*. An ikrar was also produced in evidence by the Appellant signed by *Abhoy Churn*.

Cited
ILR 14 Cal 251
(6) LRAgra 441

The Subordinate Judge held that the ikrar was proved and did not require registration, and made a decree in its terms.

Overruling
ILR 9 Cal: 309
- 7 All: 649

The District Judge rejected the ikrar for want of registration and founded his decree on the kabuliyat.

* *Present*:—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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Both Courts held that the kabuliyat had been executed as alleged. The Subordinate Judge, however, held that "the terms were so extortionate and hard," and that there was such a surrender by *Rukhit* without adequate consideration of all previously acquired rights, and an acceptance in their place of such "an unconscionable bargain," the details of which the Subordinate Judge gave, and such apparent want of proper legal advice, that *Rukhit* was not bound by the kabuliyat. And further that, as *Rukhit* purported to sign only for himself, and was not guardian *de facto* or *de jure* of the infant sons of *Abhoy Churn*, he could not bind either them or his own brothers.

The District Judge, on the other hand, held, that though "some of the stipulations in the kabuliyat were very hard and even flagrantly unjust," he, the Judge, had nothing then to do with that. But there was no reason to suppose that *Rukhit Chunder* was not a free agent, or was imposed on by fraud or misrepresentation, when he signed, and that he was therefore bound by the kabuliyat as to the amount of rent, and the area of the land; and that he executed it within the scope of his authority as manager on behalf of his nephews, for whose benefit it was, and that they therefore were also bound by it.

The High Court dismissed the suit, being of opinion that the Appellant had acted fraudulently in taking the kabuliyat, and that it could not be enforced against *Rukhit Chunder;* that, even if binding on him, it was not binding either on his major brothers, who were neither parties to the kabuliyat nor to the suit, or on his minor nephews, whose guardian he was not, and whose manager he was not shewn to be, and for whose benefit the kabuliyat decidedly was not entered into.

Branson, and *Cave* (Sir *Horace Davey*, Q.C., with them), for the Appellant, contended that as regards the kabuliyat there were concurrent findings of the first two Courts, that it was executed by *Rukhit Chunder* with sufficient knowledge of its stipulations. The High Court was not justified in finding that the Appellant had acted fraudulently in taking it, or that there had been undue influence or misrepresentation, or that the contracting parties were not of one mind as to what was agreed upon. The ikrar did

not require registration, see Act III. of 1877, sect. 17, clauses (b) and (h), and ought to have been taken into consideration.

Doyne, for the Respondents, contended that the ikrar was inadmissible in evidence for want of registration, having regard to the true construction of the clauses referred to. As regards the kabuliyat, that document was not binding on *Rukhit Chunder*, for the reasons given by the High Court. Nor was it binding on the minor Defendants, for whom he had no authority to act and to whose interests the kabuliyat was highly prejudicial. The decrees of the lower Courts affect also the interests of the brothers of *Rukhit*. But they were parties neither to the kabuliyat nor to the suit. The suit ought to be dismissed on the ground that the tenure in question being joint the kabuliyat nevertheless did not affect the interests of either the minors or the brothers of *Rukhit*.

Branson replied.

1889
June 29.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

This suit was brought by the Appellant, and the plaint stated that, on the 21st of June, 1881, the first Defendant, *Rukhit Chunder Purkait*, for himself and as guardian of three minor Defendants (two of whom are the first and second Respondents) executed a registered kabuliyat, by which he rented 177 bighas 5 cottahs and 15 chittacks of land of the Plaintiff, engaging to pay an annual rental of Rs.487. 9, and 1. 10. 12 kahans of paddy worth Rs.33. 4, total Rs.520. 13, and was in occupation of the above tenure; and that, exclusive of payments, there was due for rent and interest on overdue instalments, and for road and public works cesses, and interest thereon, a total of Rs.1,640. 11. 1, and prayed for a decree for that amount and interest during the pendency of the suit. *Rukhit Chunder*, in his written statement, said that he agreed to execute a kabuliyat, and a draft was made out and read to him, and when it was subsequently engrossed on a stamp the Plaintiff said it was just the same as the draft, and the Defendant, in reliance on that statement, signed the

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document, but the draft and the engrossment were different. The minor Defendants, by their mother and guardian, said they had no knowledge of the kabuliyat, and that *Rukhit* had no power to execute a kabuliyat on their behalf. The second Subordinate Judge of the 24-Pergunnahs who tried the case negatived the allegation that any deception was practised in getting the signature to the kabuliyat, but he held that all the terms of it were not binding on *Rukhit*, "the bargain being very unconscionable and consideration very inadequate," and that *Rukhit*, whether guardian or manager, had no power to bind the other members of the family as the contract was not for their benefit. He, however, admitted in evidence an ikrar or agreement executed on the 25th of April, 1880, by *Abhoy Churn*, the father of the minors and uncle of *Rukhit*, who died in April or May, 1881, and who was the kurta or manager of the family, and by other tenants, by which he said they agreed to pay Rs.2. 12 per bigha. And he made a decree for rent according to the ikrar of 144 bighas 9 cottahs 7 chittacks and 15 gundahs, considering that the Defendants were not proved to be bound by the area mentioned in the plaint.

From this decree there were appeals by both parties, which were heard before the Additional Judge of the 24-Pergunnahs. In his judgment, after saying that he agreed with the Subordinate Judge in the finding that *Rukhit* signed the kabuliyat, he says, to quote his own words,—"But he (the Judge) considers that the terms of the kabuliyat are so extortionate and hard that he finds it difficult to believe that the Defendant executed the kabuliyat with full knowledge of its terms, or after fully realizing the effect of the terms, or at all events that some extraneous motive or influence was used, such as a promise that all the terms would not be enforced. Now as to this I have to remark that the only question before us is, Did the Defendant knowingly execute the agreement as to the amount of rent? There are many stipulations in the kabuliyat, and some of them are very hard and even flagrantly unjust, but we have nothing to do with them just now. All we want to know is, did Defendant know what he was about when he agreed to pay the rent stated in the kabuliyat? It may be and it appears from the Naib's evidence that there are some

stipulations in the kabuliyat which were not intended to be acted upon, but they need not be considered until Plaintiff attempts to enforce them." The kabuliyat after the agreement to pay the rent contains these words: "If you (the Plaintiff) or your heirs require the land you and they will take khas possession of it. I (the tenant) and my heirs shall never have occupancy right to the said lands;" and towards the end a clause that if the rent is unpaid the tenants shall at the pleasure of the Plaintiff and of his heirs be ejected from the land, and it shall be his and his heirs' khas property. The Subordinate Judge said it had been proved to his satisfaction by printed dakhilas that the Defendants paid rent at a uniform rate for upwards of twenty years, and were therefore in a position to plead the presumption arising therefrom in an enhancement suit. The evidence of the Naib, which the District Judge appears to have believed, is that the tenants objected to the condition that khas possession might be taken at will, and therefore they were told that that condition had been inserted because then the tenants would remain under the influence (of the zemindar), and that it was not that the Plaintiff would actually eject the tenants; and that, with reference to the condition that khas possession would be taken if rent were not paid by the end of the year, it was said that this was a penalty clause, and that the law was to that effect, and the Plaintiff made those statements. It was admitted by the counsel for the Plaintiff that the statement of the effect of the law was a misrepresentation. Although the District Judge does not expressly find that there was a misrepresentation, their Lordships think that this is the effect of his judgment. He says: "Granting that they (the tenants) were under a mistake as to their position, and that Plaintiff represented his power, as an auction purchaser, as greater than it really was, this would not amount to such misrepresentation as would vitiate the contract." In this he was in error. Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently. If such a representation had not been made the tenants might have refused to sign the kabuliyat. Further, if there is any stipulation in the kabuliyat which the

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Plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the kabuliyat is not the real agreement between the parties, and the Plaintiff cannot sue upon it.

The Subordinate Judge, it has been seen, founded his decree upon the ikrar. The District Judge held that this document was inadmissible for want of registration, as operating to create or declare an interest, and coming under clause (*b*) of sect. 17 of the *Registration Act* (III. of 1877). Their Lordships are of opinion that it does not come under that clause, but under clause (*h*), as a document merely creating a right to obtain another document, which will, when executed, create or declare an interest. Its terms are that the tenants conjointly promise that they will sign and have registered kabuliyats in respect of rents at the rates mentioned for the old lands which they have, and for the excess land, if any be found on measurement. It clearly was not the kabuliyat described in the plaint, and the evidence of the Plaintiff himself shewed that it was not intended to be the final agreement. It could not be sued upon as an agreement to pay the rent claimed, which the Subordinate Judge held it to be.

The District Judge, taking the view that the only question was whether *Rukhit* agreed to pay the rent stated in the kabuliyat, and finding that he had power to contract on behalf of the minors, dismissed the Defendant's appeal, and in the Plaintiff's appeal made a decree for the Plaintiff for the amount of his claim with interest. From this the Defendants appealed to the High Court, the Plaintiff also appealing on the ground that the ikrar ought not to have been held to be inadmissible. That Court set aside the judgments of both the Lower Courts, and dismissed the Plaintiff's suit with costs in all Courts, but did not in the judgment take notice of the question of the admissibility of the ikrar. Their Lordships have doubted whether the Judges of the High Court in hearing the appeals, had regard to the provision in the Code of Civil Procedure (Act XIV. of 1882), sect. 584, as to appeals from appellate decrees, and thought they were at liberty to consider the propriety of the findings of the District Judge upon questions of fact. Certainly there are some passages in their judgment, particularly in the latter part if not in the

former, which suggest this. Their Lordships must observe that the limitations to the power of the Court by sects. 584 and 585, in a second appeal, ought to be attended to and the Appellant ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact.

For the reasons which have been stated, their Lordships are of opinion that the Plaintiff's suit should be dismissed, and that the decrees of the High Court are the proper ones. They will, therefore, humbly advise Her Majesty to affirm those decrees and dismiss the appeal. The Appellant will pay the costs of it.

Solicitors for the Appellant: *Watkins & Lattey.*
Solicitors for the Respondents: *T. L. Wilson & Co.*

Reported also 14 R 17 Cal 362

J. C.* 1889 Jan. 31; Feb. 1; Aug. 1.

STRANG, STEEL & CO. . . . . DEFENDANTS;

AND

A. SCOTT & CO. . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

General Average—Jettison—Right to Contribution—Remedies—Lien on Goods saved.

The right of contribution in respect of jettisoned cargo is based on the danger to ship and cargo requiring sacrifice to which all must contribute. Such right does not belong to the wrongdoers whose acts have led to the jettison, or to those who are legally responsible for them.

Where a ship is stranded through the negligence of her master, and thereby ship and cargo are placed in a position of such imminent danger as to make it prudent and necessary to jettison part of the cargo in order to save the remainder and the ship:—

Held, that innocent owners of the jettisoned cargo are entitled to general average; *secus* with regard to the owners of the ship unless their ordinary relations to the shippers have been varied by contract.

The rules of maritime law relating to the rights and remedies resulting from a proper case of jettison are:—

(1.) Each owner of jettisoned goods becomes a creditor of ship and cargo saved.

(2.) He has a direct claim against each of the owners of ship and cargo for a *pro ratâ* contribution towards his indemnity; which he can recover (*a*) by direct action; (*b*) by enforcing through the ship master, who is his agent for that purpose, a lien on each parcel of goods salved to answer its proportionate liability.

APPEAL from a decree of the Recorder (Aug. 15, 1887) in favour of the Respondents for Rs.1,592. 11 paid by them to the Appellants under protest to obtain the delivery of the Respondents' goods.

The facts are stated in the judgment of their Lordships.

The Recorder found as a fact that the jettison was occasioned by the negligence of the master. He held that in consequence no claim for general average contribution could be enforced, and that it was unreasonable in any case for the Appellants to insist

* *Present:*—LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and LORD MACNAGHTEN.

on having the assessment of the general average contribution paid to them so as to be under their sole control.

Finlay, Q.C., and *Barnes*, Q.C., for the Appellants, contended that the Respondents, as owners of goods salved by means of the jettison, were liable to contribute to general average for the cargo jettisoned, and the other general average expenses incurred. Even if the jettison had been, as alleged, occasioned by the master's negligence in the navigation of the ship, that did not affect the right of the innocent owners of the goods jettisoned to indemnity, or relieve the owners of the goods salved from their liability. Under such circumstances it is the duty of the master to collect the general average contributions before he parts with the goods, and in such case he acts not merely as agent for the shipowners, but also as agent for the shippers. Whether the contribution is for the benefit of ship or cargo is immaterial, in either case it is the duty of the master to collect it and to assert a lien on goods salved in respect of it. Reference was made to *Simonds* v. *White* (1); *Crooks & Co.* v. *Allan* (2); *Schloss* v. *Heriot* (3); *Hallett* v. *Bousfield* (4); *Dobson* v. *Wilson* (5); *Burton* v. *English* (6), which lays down the principle on which general average is taken: *The Cargo ex Laertes* (7); *The Glenfruin* (8).

The bills of lading under which the Respondents' goods were carried exempted the owners of the vessel from all liability in respect of the negligence of the master in navigating the vessel. Consequently the negligence of the master did not deprive the owners of the vessel of their right of lien on the cargo for general average, sacrifices and losses incurred. They were accordingly entitled to demand a deposit of 5 per cent. on the value of the goods, and to refuse to release them unless such deposit were made. See *Lowndes* on General Average (4th ed.), 332; *Abbott* on Shipping, (12th ed.), 532, citing the Digest as to the position of the master according to Civil Law; *Parsons* on Marine Insurance, c. v. s. 10, vol. ii., p. 285. The claim to general average

(1) 2 B. & C. 805, 811.
(2) 5 Q. B. D. 38, 41.
(3) 32 L. J. (C.P.) 211; S. C., 14 C. B. (N.S.) 59.
(4) 18 Ves. 187.
(5) 3 Camp. 480.
(6) 12 Q. B. D. 218.
(7) 12 P. D. 187.
(8) 10 P. D. 103.

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does not depend upon exceptions in bills of lading, it rests on the general law, springing out of the existence of a common duty of sacrifice and the resulting duty of contribution by those who are benefited by the sacrifice.

Bigham, Q.C., and *Fitzgerald*, for the Respondents, contended that the grounding of the vessel was caused by the negligence and misconduct of the master. He and the shipowners were liable for the losses thence resulting. When the master jettisoned cargo, he was the agent in doing so of the shipowners, and not of all concerned. They must bear the loss by the jettison, for under the circumstances of the case the owners of cargo were exempted, and the jettison did not give rise to a general average contribution. The sacrifice was not for the benefit of all, but for the benefit of the owners in consequence of the wrongful act of the master, see 2 *Parsons* on Marine Insurance, pp. 217, 225; *Abbott* on Shipping, ed. 1881, p. 499. If goods are jettisoned by reason of their having been brought into extra peril by the owners or master, then the goods salved are under no liability to contribute. See *Parsons* on Marine Insurance, vol. ii., p. 285; Law of Shipping, vol. i., p. 211; and the cases in reference to deck goods jettisoned, *Ware's* Admiralty Decisions (District of *Maine*), p. 326, *The Paragon*. The contract evidenced by the bill of lading and the exceptions has nothing to do with the question of general average. The case must be disentangled from the clauses in the bill of lading. See *Crooks* v. *Allen* (1); *Wright* v. *Marwood* (2); *The Norway* (3); *Huth & Co.* v. *Lamport* (4); *Ashmole* v. *Wainwright* (5); *The Ettrick* (6).

Barnes, Q.C., replied.

1889 Aug. 1.

The judgment of their Lordships was delivered by

LORD WATSON:—

The steamship *Abington*, on her way from *London* to *Rangoon*, with a general cargo, ran aground on the *Baragua Flats* in the

(1) 5 Q. B. D. 38.
(2) 7 Q. B. D. 62.
(3) Br. & Lush. 377.
(4) 16 Q. B. D. 442.
(5) 2 Q. B. 837.
(6) 6 P. D. 127, 135.

Gulf of *Martaban*. Part of the cargo was thrown overboard in order to lighten the vessel, which was got off by that means, and was enabled to reach her destination in safety on the 19th of October, 1886. On the day of her arrival in the port of *Rangoon*, the Appellants, *Strang, Steel & Co.*, local agents for the ship, intimated to the Respondents, *A. Scott & Co.*, and other consignees of the cargo then on board, that a deposit of one per cent. upon the value of their goods would be required before delivery "against probable average claim;" and on the following day they made a further intimation that the amount of deposit required would be 5 per cent. A correspondence ensued, in the course of which the Respondents made various tenders, all of which were declined; and on the 25th of October, six days after the arrival of the *Abington*, they paid the required deposit, amounting to Rs.1,592. 11, under protest, and obtained delivery of their goods.

The Respondents, on the 27th of October, 1886, instituted the present suit in the Court of the Recorder of *Rangoon* for recovery of their deposit, and for damages on account of the detention of their goods, upon the allegation that they had before payment made a tender entitling them to delivery. Upon the same day on which their plaint was filed the Respondents applied to the Court, under sect. 492 of the Civil Code, for an injunction to restrain the Appellants, *Strang, Steel & Co.*, from remitting to *England*, or removing from the jurisdiction of the Court, the deposit paid to them on the 25th of October. These Appellants judicially undertook to retain the amount claimed in their own possession, subject to the orders of the Court, without the issue of a formal injunction, and no further proceedings have been taken in that application.

On the 5th of February, 1887, the Respondents were allowed to add to their original ground of action an allegation to the effect that they were not liable to contribute for general average on account of either ship or cargo, because the grounding of the *Abington* and the consequent jettison of part of the cargo, were due to the default, negligence, and misconduct of her master. Upon the pleadings thus amended, the case was twice tried before the Recorder, who ultimately, on the 15th of August, 1887, gave

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the Respondents decree for Rs.1,592. 11, and for Rs.200, in name of damages, with costs of suit. The learned Judge found, as matter of fact, that the stranding of the ship upon the *Baragua Flats* was occasioned by the negligent navigation of the master; and he held, as matter of law, that no claim for general average arises to the owners of cargo jettisoned when the peril which necessitated jettison is induced by the fault of the ship. Whilst resting his decision upon that ground, the learned Judge indicated that, in his opinion, the Respondents had made a tender entitling them to demand immediate delivery of their goods, before they paid the deposit to the Appellants.

In the course of the argument upon this appeal, three separate points were raised and fully discussed. The Appellants argued, (1) that innocent owners of cargo sacrificed for the common good are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault; (2) that in respect the bills of lading for the cargo of the *Abington* specially excepted "any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship," the owners of cargo saved are not, so far as concerns any question of contribution, in a position to plead the fault of the master; and (3) that the Respondents did not, before the 25th of October, 1886, make a sufficient legal tender. The parties were not agreed as to the facts upon which the second of these contentions is based; but there was no controversy as to the facts upon which the first and third of them depend. It was conceded by the Appellants that the *Abington* was stranded through the negligence of her master; and, on the other hand, the Respondents admitted that the effect of her stranding was to place both ship and cargo in a position of such imminent danger as to make it prudent and necessary to sacrifice part of the cargo in order to preserve the remainder of it and the ship. The question whether the Respondents made a legal tender depends upon the construction of the correspondence which passed between the parties in October, 1886.

The first question raised is one of general importance, and, so far as their Lordships are aware, has never been made matter of direct decision in this country. It may be convenient in dealing

with it to consider first of all the rights and remedies which the owners of cargo thrown overboard have in a proper case of jettison. Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a *pro ratâ* contribution towards his indemnity, which he can enforce by a direct action. In *Dobson* v. *Wilson* (1) Lord *Tenterden* said: "If a shipper of goods which are sacrificed for the salvation of the rest of the cargo is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy."

Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the ship-master, whom the law of *England*, following the principles of the *Lex Rhodia*, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect. In the course of the argument, his liability in that respect was questioned upon the authority of certain *dicta* of Lord *Eldon's* in *Hallett* v. *Bousfield* (2). The circumstances of that case were very special. One of a number of persons alleging a right to contribution applied for an injunction to restrain the master from delivering the cargo without taking security, the bulk of them having consented to his so doing. Lord *Eldon* expressed a doubt whether it was the right of every owner of part of the jettisoned cargo to compel the captain to call on every owner of cargo saved to give security; but he dismissed the application on the ground that there was no instance of such an equitable remedy having been granted. Courts of Equity are chary of granting injunctions which may lead to inconvenient results; and it does not follow from *Hallett* v. *Bousfield* that a master might not be restrained

(1) 3 Camp. 484. (2) 18 Ves. 190.

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from making delivery of the cargo, at the instance of all or most of those entitled to contribution, without taking security for their claims. But their Lordships see no reason to doubt that, assuming the applicant's claim for contribution in that case to have been well founded, he would have had his remedy at law. In *Crooks & Co.* v. *Allan* (1), Lord Justice (then Mr. Justice) *Lush* held that a master or shipowner is bound to exercise the power he is invested with when a general loss has arisen, and to use the means in his power for adjusting the average claims and liabilities and securing their payment, and he accordingly ordained the defendants, who had neglected to perform that duty, to pay to the plaintiffs the whole amount of contribution to which they were entitled. The learned Lord Justice observed (2) that "the right to detain for contribution is derived from the civil law, which also imposes on the master of the ship the duty of having the contribution settled and of collecting the amount, and the usage has always been substantially in accordance with that law, and has become part of the common law of *Englnad*."

The rule of contribution in cases of jettison has its origin in the maritime law of *Rhodes*, of which the text, as preserved by *Paulus* (3), is, "*Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*" The principle of the rule has been the frequent subject of judicial comment. Lord *Bramwell*, in *Wright* v. *Marwood* (4), said that, to judge from the way in which contribution is claimed in *England*, "it would seem to arise from an implied contract *inter se* to contribute by those interested." The present Master of the Rolls, in *Burton* v. *English* (5), disputed that view, and stated his opinion to be that the right to contribution does not arise from any contract at all, but from the old Rhodian laws, and has been incorporated into the law of *England* as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one, in order that the whole adventure may be saved." Whether the

(1) 5 Q. B. D. 38.
(2) 5 Q. B. D. 42.
(3) Dig. L. 14, tit. 2.
(4) 7 Q. B. D. 67.
(5) 12 Q. B. D. 220.

rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice.

When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* (1) is the leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by Chief Justice *Erle*, and *Willes* and *Keating*, JJ.

The second exception is in the case of deck cargo. The

(1) 14 C. B. (N.S.) 59.

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reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship.

It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed $30,000, and that there is a small claim on account of ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of *England*, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognised in *Schloss* v. *Heriot* (1) are in truth limitations on the rule, which have been introduced, from equitable considerations; in the case of actual wrongdoers, or of those who are legally

(1) 14 C. B. (N.S.) 59.

responsible for them. The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves.

In support of the legal proposition which they induced the learned Recorder to accept, the Respondents relied upon a passage which is to be found in the original text of Lord *Tenterden's* work on Shipping (ed. 1881, p. 499). It is in these terms:—"The goods must be thrown overboard for the sake of all, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods, but because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety." It appears to their Lordships that, if Lord *Tenterden* had really meant to lay down the rule that there can be no contribution for jettison in the case of a ship overladen through the fault of those who received and put her cargo on board, he would have done so in plain terms. What he does say is, that there can be no proper jettison from an overladen ship, so long as ship and cargo are exposed to no peril whatever from the action of the sea, but are merely exposed to the inconvenience of being unable to reach their destination in the ordinary course of time.

The authority upon which the Respondents placed their chief reliance was that of Mr. *Parsons*, who, in his treatise on the Law of Insurance (vol. ii., p. 285), and also in his Law of Shipping (vol. i., p. 211), states that "when a jettison is justified by the circumstances in which it takes place, and these circumstances are occasioned by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrongdoing of the master." In both works, the proposition is laid down in precisely the same terms, and the same cases are referred to. These treatises are justly regarded as of great authority in questions of maritime law: but their Lordships are constrained to say that

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in their opinion the text above cited is inaccurate, in so far as it bears that no claim of contribution will arise to the owners of jettisoned cargo in the case supposed, and is unsupported by the decisions upon which it is founded, which, all of them, relate to one or other of the exceptions already noticed.

Upon the question of legal tender, their Lordships are unable to concur in the opinion expressed by the learned Recorder. The correspondence which passed, before the deposit was paid, appears to them to shew that both of the parties were exceedingly unaccommodating, and somewhat unreasonable, and that neither of them was altogether in the right.

Their Lordships, even if it had been desirable to decide the second point urged for the appellants, are not in a position to do so, because there is no proof and no admission to the effect that, as alleged by them in argument, all the bills of lading for goods shipped in the *Abington* contained the same exception with those produced, of the master's act, neglect, or default in navigating the ship. But this is not a suit for recovery of contribution; and the appellants, if it be necessary, will not be precluded from substantiating their averments in the adjustment of average claims.

The result is that their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the respondents' action, with costs in the Court below. The respondents must also pay the costs of this appeal.

Solicitors for appellants: *Crump & Son.*
Solicitors for respondents: *Badham & Gore.*

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